

(21,913.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 687.

CATHERINE SCHLEMMER, NOW CATHERINE CRAIG,
PLAINTIFF IN ERROR.

vs.

THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY
COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

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1 In the Supreme Court of Pennsylvania, in and for the Western District.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, *sc:*

Among the records and proceedings of the Supreme Court of Pennsylvania, in and for the Western District, the following may be found as matter of file and of record at No. 135 Oct. Term, 1908, to wit:

2 Among the records and proceedings enrolled in the Court of Common Pleas in and for the County of Jefferson in the Commonwealth of Pennsylvania, to No. 194 April Term, 1901, is contained the following,—

Copy of Continuance Docket Entry.

194.

CATHERINE SCHLEMMER
vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Summons in Trespass. Issued March 20, 1901. Ret. to next Term.

March 26, 1901, Served the within Summons on the within named Defendant Company by giving to L. C. McGaw, Agent of the within named Company at Punxsutawney, Jefferson County, Pennsylvania, a true and attested copy and by making known to him the contents thereof. May 17, 1901, Plaintiff's Statement filed. May 17, 1901, Rule on the defendant to plead within 15 days or judgment sec. leg. issued. May 18, 1901, Served the within Rule personally on the within named defendant company by giving to C. Z. Gordon, Attorney of said Company a true and attested copy of the same at his office in the Borough of Brookville, Jefferson County, Pennsylvania, and by making known to him the contents thereof. May 18, 1901, Defendant's Plea of "Not Guilty" filed. T. L. Nov. Term, 1901,

3 Octo. 25, 1901 Compulsory Rule to choose arbitrators on the part of the defendant on No. 20, 1901, at 10 o'clock A. M. issued. November 20, 1901, Samuel States, Chas. S. Irvin and H. W. Mundorff chosen Arbitrators who are to meet at the Court House December 10, 1901, at 9 o'clock A. M. Same day Rule to Arbitrators issued. Decr. 9, 1901, Agreement of counsel to strike off Rule of Reference filed. Nov. 22, 1901, served Rule to Arbitrate on Defendant by giving a true and attested copy of same to her Atty. Jeff G. Wingert, Esq., &c. Same day served personally on H. W. Mundorff, Nov. 23, 1901, Served same personally on Samuel States and Chas. S. Irvin. T. L. April Term, 1902. April 29, 1902, Jury called and sworn. Same day motion for compulsory non suit granted by the court, with leave to Plaintiff to make motion to take same off within four days, By the Court. May 2, 1902, Motion to take off compulsory non-suit filed. July 22, 1902, opinion of court

filed and motion to take off the compulsory non-suit heretofore granted is refused. Frank F. Thomas, President Judge 30th Jud. Dist. specially presiding. Jany. 19, 1903, Certiorari from Supreme Court filed and notice of filing served on C. Z. Gordon, Atty. for Defendant. Jany. 24, 1903, Notes of testimony filed. Sept. 15, 1903, Exception and Bill sealed on motion to set aside non-suit by Hon. Frank J. Thomas, P. J. 30th Judicial Dist. specially presiding, filed. Octo. 9, 1903, Exit Record to Supreme Court Nov. 20, 1903, Record from Supreme Court returned with Remittitur and opinion of the Court, affirming the judgment of the lower Court. March 14,

4 1905, forthwith certiorari from Supreme Court demanding record filed. Same day record returned to Supreme Court. July 29, 1907, record returned from the Supreme Court, together with remittitur and the following order: "And now, to wit, July 25, 1907, In obedience to the mandate of the Supreme Court of the United States, the order heretofore entered in this case is rescinded and the judgment of the Court of Common Pleas of Jefferson County is reversed and procependo awarded, with directions to try the case upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of this court. Per Curiam."

T. L. Novr. Tr. 1907. Novr. 14, 1907, Motion of A. J. Truitt, Esq., Atty. for plaintiff, for continuance of this case presented and filed in open court and motion granted and case continued at the costs of the plaintiff for the term. By the Court. Decr. 16, 1907, Motion to amend name of Plaintiff so as to read "Catharine Craig" and amendment allowed, By the Court. Same day motion for rule on the defendant to produce books or writings, records or documents at trial, presented in open court and rule granted By the Court. Same day rule issued. Decr. 23, 1907, Bill of Exceptions sealed to the defendant on motion of plaintiff for Rule on defendant to produce books &c., Harry R. Wilson, (Seal) P. J. of the 18th Judicial District specially presiding. Vide paper filed. Decr. 24, 1907.

5 Amendment of Plaintiff's Statement filed and notice to C. Z. Gordon, Esq. Atty. for defendant of filing same. T. L. January Term, 1908. January 13, 1908, motion to make rule granted Decr. 16, 1907 for production of certain books, &c., absolute, presented in open Court and motion granted by the Court. (Vide Order of Court endorsed on back of motion.) Jany. 13, 1908, Motion to strike off Amended Statement of Claim presented and filed in open court and Rule to show cause granted. Ret. on 4th Monday of January, 1908, By the Court. Jany. 27, 1908, Jury called and sworn. Same day Rule on motion to strike off the amended statement of claim is discharged and motion refused, By the Court. Jany. 29, 1908, Plaintiff's and Defendant's Points filed. Same day jury find for plaintiff in the sum of ten thousand dollars (\$10,000.00). January 29, 1908, motion by defendants for judgment non obstante veredicto presented and filed in open court and rule to show cause granted ret. on 1st Monday March next, and it is ordered and decreed that all evidence taken upon the trial be duly certified and filed and made a part of the record By the Court. February 27, 1908, notes of testimony filed. June 5, 1908, opinion of court filed and rule for

judgment non obstante veredicto is made absolute and judgment upon the whole record is now entered in favor of the defendant, By the Court, John W. Reed, President Judge. Same day (June 5, 1908) the plaintiff excepts to the ruling and judgment of the court and at her request bill of exception sealed, John W. Reed, (Seal) President Judge. June 29, 1908, Certiorari from the Supreme Court filed and notice of filing accepted by C. Z. Gordon, Atty. for Deft. Sept. 29, 1908, exit record to Supreme Court. Feby. 3, 1909 record returned from Supreme Court and remittitur and opinion of Supreme Court affirming judgment of lower court, filed. March 11, 1909, forthwith certiorari from Supreme Court demanding record filed.

7 In the Court of Common Pleas of Jefferson County.

No. —. April Term, 1901.

CATHERINE SCHLEMMER

v.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Cyrus H. Blood, Esq., Prothonotary of said Court.

SIR: Issue summons in an action of trespass, returnable sec. leg.

JEFF. G. WINGERT,

Attorney for Plaintiff.

March 20th, 1901.

8 No. 194, April Term, 1901. Catherine Schlemmer v. The Buffalo, Rochester and Pittsburg Railway Company. Praeceptum for Summons in Trespass. Filed March 20, 1901. Wingert.

9 *Summons.*

STATE OF PENNSYLVANIA,
Jefferson County, ss:

The Commonwealth of Pennsylvania to the Sheriff of said County,
Greeting:

[SEAL.]

We command you that you summon The Buffalo, Rochester and Pittsburg Railway Company, so that it be and appear before our Court of Common Pleas to be held at Brookville, in and for said County, on the second Monday of April next, to answer Catherine Schlemmer in a plea of trespass. Damages claimed and have you then and there this writ.

Witness the Hon. John W. Reed, President Judge of our said Court at Brookville, the 20th day of March in the year of our Lord, 1901.

CYRUS H. BLOOD,
Prothonotary.

10 No. 194, April Term, 1901. Catharine Schlemmer v. The Buffalo, Rochester and Pittsburg Railway Company. Summons in Trespass. Jeff. G. Wingert, Attorney.

March 21, 1901, Served the within Summons on the within named defendant company by giving to L. C. McGaw, agent of the within named company, at Punxsutawney, Jefferson County, Pennsylvania, by giving him a true and attested copy & by making known to him the contents thereof.

So ans.

J. M. CHESNUTT, *Sher-ff*.

Sher-ff costs Chesnutt, \$5.53.

Sworn to and subscribed before me this 6- day of April, 1901.

CYRUS H. BLOOD, *Pro*.

11 In the Court of Common Pleas of Jefferson County.

No. — of April Term, 1901.

Trespass.

CATHERINE SCHLEMMER

v.

THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY
(a Corporation).

Plaintiff's Statement.

JEFFERSON COUNTY, ss.:

The plaintiff, Catharine Schlemmer, claims of the defendant, The Buffalo, Rochester and Pittsburg Railway Company, a corporation, the sum of Ten Thousand Dollars, which is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement:

The defendant was summoned to answer plaintiff of a plea of trespass and thereupon plaintiff by her attorneys, J. G. Wingert and A. J. Truitt, complains of defendant, a corporation duly organized and doing business within the State of Pennsylvania—in the Counties of Jefferson and Clearfield among others—and having certain of its works, tracks, cars and other equipment in said counties of Clearfield and Jefferson and carrying on certain of its purposes and operations in said Counties.

That Adam M. Schlemmer, husband of plaintiff had been
12 for some time theretofore and was on the 5th day of August A. D. 1900 in the employ of defendant company, on said particular date acting in the capacity of flagman on one of defendant's freight trains. And while thus employed her said husband on said day, to wit, August 5th, A. D. 1900 was killed by reason of defendant's negligence as will hereinafter appear and this action has been instituted to recover the damages therefor. Said damages

for said injury resulting in the death of plaintiff's husband belonging to plaintiff as widow and to her two children Edwin E. Schlemmer, aged 4 years, and Charles C. Schlemmer, aged 3 years, they being all the children left by decedent thus entitled along with plaintiff.

Decedent was a careful, competent, willing and faithful employee of defendant company. And while engaged in the line of his duties and of his employment on said date, viz.: August 5, 1900, in what is known as the Dubois yards of defendant company in the county of Clearfield aforesaid he lost his life by reason of defendant's carelessness as shown by the following facts and circumstances, viz.:

Defendant had received and was transporting over its railroad and under its direction what is known as a shovel or shovel car or steam shovel car which is used in construction work. The coupling of this shovel car was exceedingly complicated and dangerous.

13 Decedent was not warned by plaintiff in any way or manner of this unusual and dangerous arrangement or appliance and darkness having come on went under this shovel car with his lantern burning brightly to make the coupling; the drawbar of the coupling on the shovel car was unusually large and heavy weighing some 80 pounds; decedent used good judgment, did his best, made use of his former knowledge of all ordinary contrivances of this kind but by reason of defendant's negligence and carelessness in not having instructed him in the manipulation of this dangerous coupling and in not having warned him in regard to same the decedent failed in making the coupling and his head was caught between the steam shovel car and the end sill of the caboose to which he was trying to couple the shovel car and thus he was killed, dying in about one hour thereafter his head having been crushed as aforesaid. By reason of the darkness decedent could not observe many things which he otherwise might have had it been daylight. Said dangerous shovel car had no deadwoods it projected over the drawhead several feet and the drawhead itself was what is known as an old fashioned one not being a patent one and safe in any respect or of the latest and best appliance of its kind. Said coupler was not a legal coupler or coupling as required by existing laws on date decedent's death viz. on August 5, A. D. 1900. Defendant was transporting said shovel car from Limestone in the

State of New York through the State of Pennsylvania.

14 Decedent at time of his decease was of the age of 31 years, in good health, able and strong and willing to work, received good wages.

Therefore plaintiff on account of defendant's negligence and carelessness as aforesaid in causing the death of her said husband has brought this action against defendant to recover said sum of Ten thousand dollars being the pecuniary loss sustained by her and her said children by reason thereof.

JEFF. G. WINGERT,
A. J. TRUITT,
Attorneys for Plaintiff.

15 No. —, April Term, 1901. Com. Pleas Jeff. Co. Catharine Schlemmer v. The B. R. & P. Ry. Co. Pl'ff's Statement. Filed May 17, 1901. J. G. Wingert, A. J. Truitt, Att'ys.

16 In the Court of Common Pleas of Jefferson County.

No. —, April Term, 1901.

CATHERINE SCHLEMMER

v.

THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

To Cyrus H. Blood, Esq., Prothonotary of said Court.

SIR: Issue rule on defendant to plead in 15 days, or judgment sec. reg.

JEFF G. WINGERT,
A. J. TRUITT,
Attorneys for Plaintiff.

May 16th, 1901.

17 No. 194, April Term, 1901. Catharine Schlemmer v. The Buffalo, Rochester and Pittsburg Railway Company. Præcipe for rule to plead. Filed May 17, 1901. Wingert—Truitt.

18 In the Court of Common Pleas of Jefferson County.

April Term, A. D. 1901. No. 194.

CATHARINE SCHLEMMER

vs.

THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

And now, to wit: May 17th, 1901, at the instance of Jeff G. Wingert and A. J. Truitt, Esqs., Attorneys for the plaintiff Rule on the defendant above named to plead within 15 days or judgment will be entered sec. reg.

Certified from the record.

[SEAL.]

CYRUS H. BLOOD,
Prothonotary.

Brookville, Pa., May 17th, 1901.

19 No. 194, April Term, 1901. Catharine Schlemmer vs. The Buffalo, Rochester and Pittsburg Railway Company. Rule on Defendant to Plead. Truitt & Wingert.

May 18" 1901, served the within Summons personally on the within named Defendant Co. by giving to C. Z. Gordon attorney of said company a true and attested copy of the same at his office in

the borough of Brookville Jefferson County Pennsylvania & by making known to him the contents thereof.

So ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff's costs Chesnutt, \$2.24.

Sworn to and subscribed before me this 18th day of May 1901.
CYRUS H. BLOOD, *Pro.*

20 In the Court of Common Pleas of Jefferson County.

Of April Term, 1901. No. 194.

CATHERINE SCHLEMMER

vs.

THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Defendant's Plea.

May 18th, 1901, the defendant by C. H. M'Cauley and C. Z. Gordon, its attorneys, pleads Not Guilty.

C. H. M'CAULEY,

C. Z. GORDON,

Att'ys for Defendant.

21 No. 194, April Term, 1901. Catherine Schlemmer v.
The Buffalo, Rochester & Pittsburg Railway Co. Defendant's
Plea. Filed May 18, 1901. M'Cauley, Gordon, Def't's Att'ys.

22 In the Court of Common Pleas of Jefferson County, Pa.

No. 194 of April Term, 1901.

CATHERINE SCHLEMMER

vs.

THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Compulsory Rule of Reference.

And now, to wit, on this 25th day of October, A. D. 1901, the defendant, by C. Z. Gordon, its attorney, comes into the office of the Prothonotary of the Court of Common Pleas of Jefferson County, Pa., and enters a rule of reference in the above cause, and states it to be the determination of the said defendant company to have arbitrators chosen on the 20th day of November, A. D. 1901, at ten o'clock in the forenoon of said day at the office of the Prothonotary of said court, in the Borough of Brookville, in the county aforesaid, for the trial of all matters in variance between the parties in the above stated action, agreeably to the Act of Assembly of the Commonwealth of Pennsylvania, entitled "An Act Relating to Reference

and arbitration," passed the 16th day of June, A. D. 1836, and its supplements.

C. Z. GORDON,
Attorney for the Defendant.

23 No. 194, of April Term, 1901. Catharine Schlemmer vs. The Buffalo, Rochester & Pittsburg Railway Company. Compulsory Rule of Reference. Filed Octo. 25, 1901.

24 JEFFERSON COUNTY, ss:

In the Common Pleas of Jefferson County.

No. 194 of April Term, 1901.

CATHERINE SCHLEMMER

vs.

THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

And now, to wit, The 25th day of October 1901, the defendant files its determination to have all matters at variance between the parties submitted to Arbitrators to be chosen at the Prothonotary's Office, in Brookville, on the 20th day of November next at 10 o'clock A. M. of said day.

Extract from the record.

CYRUS H. BLOOD,
Prothonotary.

And now, November 20, 1901, Plaintiff by Jeff. G. Wingert, Esq. and C. C. Benscoter for defendant met and the Prothonotary fixed the number of arbitrators at three and made choice of Samuel States, Chas. S. Irvin and H. W. Mundorff who are to meet at the Court House on the 10th day of December, 1901 at 9 o'clock A. M.

JEFF G. WINGERT,
Att'y for Pl'tff.

C. C. GORDON,
Att'y for Deft,

Per C. C. BENSCOTER.

25 No. 194. April Term, 1901. Catharine Schlemmer v. The Buffalo, Rochester and Pittsburg Railway Co. Rule to Choose Arbitrators. Served on me October 28th 1901. A. J. Truitt, Att'y for Pl'tff. Gordon.

26

Rule to Arbitrate.

JEFFERSON COUNTY, ss:

In the Common Pleas of Jefferson County.

No. 194 of April Term, 1901.

CATHERINE SCHLEMMER

vs.

THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY CO.

And now, to wit, — Plaintiff and Defendant by Attorneys, having met at the Prothonotary's office made choice of Samuel States, Chas. S. Irvin and H. W. Mundorff to whom all matters of variance between the parties in this case are to be submitted, who are to meet at the Court House in the borough of Brookville, on the 10th day of December, 1901, next at Nine (9) o'clock, A. M.

Extract from the record.

CYRUS H. BLOOD,
Prothonotary.

27 No. 194, April Term, 1901. Catharine Schlemmer vs. The Buffalo, Rochester and Pittsburg Railway Company. Rule to Arbitrators.

Sworn to and subscribed before me this 31 day of December 1901
[SEAL.] CYRUS H. BLOOD.

Nov. 22, 1901, Served the within rule on the within named plaintiff Catharine Schlemmer by leaving a true and attested copy of same with her att'y Jeff Wingert & by making known to said att'y the contents thereof; also same day served same personally on the within named H. W. Mundorff by giving to him a true and attested copy & by making known to him the contents thereof.

Nov. 23rd 1901, served same on Samuel States & Chas. S. Irvin by leaving with an adult member of their families a true and attested copy of same & by making known to said adults the contents thereof.

So ans.

J. M. CHESNUTT, *Sh'ff.*

Sh'ff costs Chesnutt, \$13.20.

29 In the Court of Common Pleas of Jefferson County, Pa.

No. 194 of April Term, 1901.

CATHARINE SCHLEMMER

vs.

THE BUFFALO, ROCHESTER & PITTSBURG RAILWAY CO.

December 9th, 1901, it is hereby agreed between plaintiff and defendant in above stated case, by their respective attorneys, that the

rule of reference heretofore taken out to be stricken off without prejudice to the rights of either party.

A. J. TRUITT,
Attorney for Plaintiff.
C. Z. GORDON,
Attorney for Defendant.

30 No. 194 of April Tr. 1901. Catharine Schlemmer vs. The Buffalo, Rochester and Pittsburg Railway Co. Agreement to strike off Rule of Reference. Filed Dec. 19, 1901.

31 In Common Pleas, Jeff. Co.

No. 194, April T., 1901.

CATH. SCHLEMMER
v.
B., R. & P. Ry. Co.

Now, April 29, 1902, Def'ts by its Att'ys moves for a non suit in the above cause for the following reasons

1. That there is no proof of any negligence on part of defendant in this cause.

2. That the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel—that this omission was the fault of the deceased exclusively—and that deceased was guilty of contributory negligence and there can be no recovery in this case.

3. That under all the evidence in this case *there* the verdict must be for the defendant.

C. Z. GORDON,
C. H. M'CAULEY,
Att'ys for Def't.

32 No. 194, April Term, 1901. April 29, 1902, Notice for Compulsory Non-suit granted with leave to the plaintiff to make a motion to take same off within four days. By the Court.

33 In the Court of Common Pleas of Jefferson County.

No. 194, April Term, 1901.

CATHERINE SCHLEMMER
v.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

And now, May 2nd, 1902, the plaintiff, by her attorneys, A. J. Truitt and Jeff G. Wingert, moves the Court to take off the compulsory non suit entered in above case for the following reasons, viz.:

First. The court erred in directing the jury to render a verdict for the defendant.

Second. The Court erred in ruling as a matter of law that the plaintiff was not entitled to recover in this case.

Third. That the evidence showed that the decedent, Adam M. Schlemmer, was not negligent, and used all the care demanded by the circumstances.

Fourth. That under the United States Statutes specially pleaded in this case, *that* the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler.

Fifth. The evidence showed that the defendant company violated the law, and was, therefore, guilty of negligence and caused decedent's death.

Sixth. That the evidence showed that the coupling which the decedent attempted to make was complicated, difficult and dangerous, and defendant company had neglected to instruct decedent as well as inform him of the nature thereof.

Seventh. That the evidence disclosed that the car coupling in this case was out of date, more dangerous than the old link and pin coupling, and not a reasonably safe appliance.

Eighth. That the evidence showed that the decedent attempted to make coupling with lantern lighted, and that it was a question for the jury to determine whether decedent used ordinary care.

Ninth. That the evidence of the experts showed that the shovel car in this case was the first car of this kind handled by them in many years of experience, that it had an unusual coupling, that it had no deadheads or bumpers thereon, and that the defendant company accepting such a car thus equipped was guilty of negligence *per se*.

A. J. TRUITT.
JEFF G. WINGERT.

No. 194. Apl. Tr. 1901. C. P. Jeff. Co. Catherine Schlemmer v. The Buffalo, Rochester and Pittsburg Railway Company. Motion to take off Compulsory Non-suit. Filed May 2, 1902. Jeff. G. Wingert, Attorney at Law, Punxsutawney, Pa.

In the Court of Common Pleas of Jefferson County.

No. 194, April Term, 1901.

CATHERINE SCHLEMMER

v. -

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Sur Motion to Take Off Compulsory Non-suit.

Thomas, P. J., Specially Presiding.

Opinion.

It is urged that we erred in granting this non suit for two principal reasons:—That the evidence on the part of plaintiff tended to show

negligence on the part of defendant, free from any negligence on the part of decedent that contributed to the accident that caused his death, and that said evidence showed that defendant company had violated the United States statute, specially pleaded, with reference to the equipment of the car that caused decedent's death with the proper safety appliances by such statute provided for.

Ordinarily a master is required to provide for his servants or employees, not perfect, or even the best of appliances, but
37 such as are reasonably suitable for the purpose of carrying on the business about which they are engaged. When this has been done, the employee assumes the risk of injury from such ordinary dangers as necessarily and usually accompany his employment and from any unusual dangers incident to said employment of which he had notice and voluntarily exposed himself thereto.

The evidence showed that plaintiff's decedent, who was shown to have been a competent man in the position of brakeman, which he occupied and in which he had had considerable experience, attempted to make a coupling, which was shown not to have been complicated or difficult to understand, and of which said decedent undoubtedly had a thorough knowledge and comprehension, between one of defendant's cars and a steam shovel or construction car which was being conveyed by defendant company, for some private parties, from a point in the state of New York to one in this commonwealth; that plaintiff's decedent, who could evidently see and understand the said couplings as attached to the steam shovel, had his attention called thereto, and was directed as to his position in making use thereof twice by the conductors of his own train and of the switching engine crew, and within a very few minutes of the accident; and that in making said coupling, decedent, contrary to the instruction, immediately prior thereto given, raised his head too much, and because of that, as well as because of the irregularity or unevenness of the heights of the respective car and steam shovel,
38 and the absence of bumpers or deadwoods that would properly operate for the purpose of preventing that which actually happened, the decedent's head was crushed, resulting in his almost immediate death.

The plaintiff's statement declares that the coupling of the steam shovel was exceedingly complicated and dangerous and that decedent was not warned of said unusual and dangerous appliance, and by reason thereof, the accident happened which resulted in the death of decedent.

Plaintiff's testimony not only fails to sustain these charges but quite negatives them.

That the coupling arrangement was not complicated was made very apparent by the testimony; that decedent was warned as to the danger and directed as to the manner of operation was conclusively proven; and that he attempted the act of making the couplings with a full knowledge of the danger seems to be beyond controversy.

A citation of authorities is not necessary to show that the de-

fendant company is not to be held for negligence because of the fact that it has undertaken to convey a steam shovel equipped with a means of coupling which is not of the latest device, or even if it were dangerous, where the brakeman understood or was made aware of the difficulty or danger to be guarded against; nor
39 if the injury was caused by the fault of the employee in taking unnecessary risks, or in failing to heed warnings or instructions, especially when given by his superiors whose duty it is to do so; nor by voluntarily placing himself unnecessarily in a dangerous position whereby he is injured.

It is alleged that these rules are not applicable to the case at bar, or rather that the case at bar is removed therefrom by the act of congress, which went into effect a few days prior to this accident, and which prohibits all carriers from hauling or permitting to be hauled on their lines any car used in interstate traffic which is not equipped with the automatic coupler, the eighth section of which provides, "that any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such common carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

It is urged that this steam shovel was not a "car used in interstate traffic," and therefore, the act of Congress is not applicable thereto.

Our attention has been called to the decision of the United States Circuit Court for the Southern District of Iowa, in the case of *White v. Chicago Great Western Railway Company*, and referred to in the Fifteenth Annual Report of the Interstate Commerce Committee, p. 67, where in construing a statute quite
40 similar, it was held that a locomotive tender was not a car within the meaning of the act.

In our opinion, this would be putting a stricter construction on the act than was intended by the law-making power, and possibly more strict than is literally warranted. But we are of opinion that this shovel car was not a car used in interstate commerce or any other kind of traffic. Such was not its purpose nor the use to which it was being put.

But even were the steam shovel, as shown to have been operated or transferred and equipped, construed to come under the provisions of said act, we are of opinion that plaintiff is not entitled to recover, for the reason that her own testimony adduced at the trial showed the decedent to be guilty of negligence that contributed to his death.

True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employee to voluntarily inflict an injury upon himself by

means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.

41 We think the true position to be, that the employee is placed in the position that he would be, in case he were furnished with a defective appliance, which fact is known to his employer but not, either actually or constructively, to the employee. In such a case the employee has not assumed the said risk incident to his employment, and yet we trust it would not be seriously contended that such an employee might recover for an injury to which his own negligence had contributed.

It has been held that contributory negligence will bar a recovery for an injury inflicted by defendant's negligence which is the result of a failure to comply with statutory requirements. *McRichard v. Flint*, 114 N. Y. p. 222; *Grand v. Mich. and C. R. Co.*, 3 Mich. p. 564; and *Nugent v. Vandever*, 38 Hun. p. 487, (same case on re-argument, 39 Hun. 322).

As persuasion of the correctness of this theory, we call attention to the fact that, early in this law's operation, the Interstate Commerce Commission, through its Secretary, addressed a letter (which is referred to in their Fourteenth Annual Report, p. 84), to the subordinate branches or various railway organizations calling attention to the provisions of said act and also gave it as the opinion of the Commission that section 8 of the act does not fully release them from responsibility for contributory negligence.

It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that 42 decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover.

And now, July 21, 1902, the motion to take off the compulsory non-suit heretofore granted is refused.

FRANK J. THOMAS,

President, Judge 30th Jud. Dist., Specially Presiding.

43 No. 194, April Term, 1901. Catherine Schlemmer v. The Buffalo, Rochester & Pittsburg Railway Company. Opinion of Court sur motion to take off compulsory non-suit. Filed July 22, 1902.

44 In the Court of Common Pleas of Jefferson County.

No. 194 of April Term, 1901.

CATHARINE SCHLEMMER

VS.

THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Plaintiff by her attorneys excepts to the refusal of the Court to set aside the non suit in this case, and at their request a bill of exceptions is sealed, as of July 21, 1902.

FRANK J. THOMAS, [SEAL.]

*President Judge 30th Judicial District,
Specially Presiding.*

45 No. 194 April Term, 1901. Catherine Schlemmer vs. The Buffalo, Rochester and Pittsburgh Railway Co. Exception and Bill. Filed Sept. 15, 1903.

46 The Supreme Court of Pennsylvania.

WESTERN DISTRICT,

County of Allegheny, ss:

The Commonwealth of Pennsylvania, to the Judges of the Court of Common Pleas No. — for the County of Jefferson, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Catharine Schlemmer from the Judgment of your said Court, at No. 194 of April Term, A. D. 1901, wherein the above-named Appellant is Plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the second Monday of October, 1903, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable J. Brewster McCollum, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the seventeenth day of January in the year of our Lord one thousand nine hundred and nine.

[Seal of the Supreme Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

46½ Notice of filing within writ served on me Jan'y 19, 1903.
C. Z. GORDON,
Att'y for Appellee.

[Endorsed:] No. 194 April Term, 1901. No. 30. of October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, vs. The Buffalo, Rochester and Pittsburgh Ry. Co. Certiorari to the Court of Common Pleas No. — for the County of Jefferson. Returnable the second Monday of October, A. D. 1903. Rule on the Appellee to appear and plead on the Return Day of the Writ. George Pearson, Prothonotary. Filed January 19, 1903. Jenky & Corbet, A. J. Truitt, J. G. Wingert, Attorneys for Appellant.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

JOHN W. REED, [L. s.]
Pres't Judge.

WESTERN DISTRICT,

County of Allegheny, ss:

The Commonwealth of Pennsylvania, to the Judges of the Court of Common Pleas No. — for the County of Jefferson, Greeting:

Whereas, By virtue of our Writ of Certiorari to No. 30 of October Term 1903, of our Court, a record in the matter of the appeal of Catharine Schlemmer from the judgment of your said Court at No. 194 of April Term 1901 was brought into our said Court, and the said cause was there so proceeded in that on the 25th day of July A. D. 1907, the following decision was rendered, viz: In obedience to the mandate of the Supreme Court of the United States the order heretofore entered in this case is rescinded and the judgment of the Court of Common Pleas of Jefferson County is reversed and procedendo awarded with directions to try the case upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of this Court.

Per CURIAM.

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Supreme Court as aforesaid.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the 27th day of July in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Pennsylvania.]

GEO. PEARSON,

Prothonotary.

47½ [Endorsed:] No. 194 April Term, 1901. No. 30, October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, vs. The Buffalo, Rochester and Pittsburgh Ry. Co. Remittitur. Filed July 29, 1907. Costs: Attorney, \$3.

In the Court of Common Pleas of Jefferson County.

No. 194 of April Term, 1901.

CATHERINE SCHLEMMER

v.

BUFFALO, ROCHESTER AND PITTSBURG RAILWAY CO.

Whereas the Supreme Court of Pennsylvania in its remittitur of above action made the following order:

"In obedience to the mandate of the Supreme Court of the United States the order heretofore entered in this case is rescinded and the judgment of the Court of Common Pleas of Jefferson County is reversed and procedendo awarded with directions to try the case

upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of this Court.

Per CURIAM."

And Whereas plaintiff believing herself aggrieved by said order did on October 15th, 1907, present her motion to said Supreme Court of Pennsylvania, moving said court to inter alia "correct or amend the order entered in the above entitled cause on the 25th day of July A. D. 1907 by striking therefrom the following namely: upon the settled principles of law as to contributory negligence as heretofore declared in the decisions of this court and to insert in lieu thereof the following, namely; in conformity with law or the following namely: in conformity with the opinion of the Supreme Court of the United States filed in the above entitled cause, March 4, 1907" etc. etc.

And Whereas said Supreme Court of Pennsylvania disposed of said Motion to amend as follows:

"Nov. 11, 1907, The order heretofore made, on July 25, 1907, is now supplemented by the further order, that the court below shall issue execution on the præcipe of appellant, for her costs, as adjudged by the mandate of the Supreme Court of the United States, and for her costs to the present time incurred in this Court. The petition for further amendment of the order of July 25th, 1907, is denied.

Per Curiam—Mitchell, C. J."

And Whereas above action is on the present November 1907 Trial List of Jefferson County Court of Common Pleas—set for trial in said Court of Common Pleas on November 26th, 1907, and said Supreme Court of Pennsylvania only disposed of said Motion to amend on Nov. 11, 1907, and plaintiff has been awaiting said disposition thereof and feels that the order now made in relation thereto would render a trial in the lower Court only abortive and useless, and plaintiff has been unable to locate or learn of the present residence of certain of her witnesses herein, and further that it is the intention of plaintiff and her attorneys to go back again into said Supreme Court of the United States and take further action and proceedings in relation to this action and the orders aforesaid made by said Supreme Court of Pennsylvania that justice may be done plaintiff and an orderly and proper administration of the law may be reached, and this being first time this action has been on said trial list since said remittitur and this action now being pending in said higher courts,

Wherefore for all said causes and matters the said plaintiff by her attorney A. J. Truitt does now this 14th day of November A. D. 1907, move in open Court for a continuance of said above action and the present trial thereof.

A. J. TRUITT,
Attorney for Plaintiff.

No. 194 Apl. Term 1901. Com. Pleas Jefferson County.
Catharine Schlemmer v. Buffalo, Rochester and Pittsburg
Railway Co. Motion for Continuance. Nov. 14, 1907, presented

and filed in open court. Motion granted and case continued at the costs of the plaintiff for the term. By the Court. Law Office A. J. Truitt Punxsutawney Pa.

52 In the Court of Common Pleas of Jefferson County.

No. 194 of April Term, 1901.

CATHARINE SCHLEMMER

v.

BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Whereas the plaintiff in above action Catharine Schlemmer has since the former trial thereof in said Court married — Craig.

Now Dec. 16, 1907, said plaintiff by her attorney A. J. Truitt, moves in open court to amend name of plaintiff in this action to that of Catharine Craig so that plaintiff's present name, viz. Catharine Craig shall be named and used as plaintiff therein.

A. J. TRUITT,
Atty. for Plaintiff.

53 No. 194 Apr. Tr. 1901. Com. Pleas Jefferson County.
Catharine Schlemmer v. Buf. Roch. & Pitts. Ry. Co. Motion to Amend name of plaintiff, by reason her marriage, to Catharine Craig. Dec. 16, 1907, presented and filed in open court and amendment allowed. By the Court.

54 In the Court of Common Pleas of Jefferson Co.

No. 194 of April Term, 1901.

CATHARINE SCHLEMMER

v.

BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Trespas.

STATE OF PENNSYLVANIA,

County of Jefferson, ss:

A. J. Truitt, attorney for the plaintiff in above action and fully acquainted with the facts therein, being duly sworn according to law, doth depose and say, that the defendant in above action, now depending in said court, has in its possession books or writings, records or documents, which contain evidence pertinent to the issue in above action, in that the shovel car which caused the accident to plaintiff's decedent and the damages thus occasioned her she has instituted this action, affiant has been reliably informed and believes and expects to be able to prove in this action was at date said accident, to wit, Aug. 5, 1900, interstate commerce, having been received by defendant in the State of New York at Limestone it is

alleged and was being transported by defendant from said state into and through the state of Pennsylvania, to Glenshaw it is alleged, over its the defendant's lines; said accident said date occurring in the Dubois, Pa., yards of defendant and as alleged by plaintiff by reason of said shovel car not being equipped with a legal coupling as required then by the Statute of the U. S. approved Mar. 2, 1893, by 52nd Congress, 2nd session, ch. 196—U. S. Statutes at Large, Vol. 27, 532, and which said Act of Congress is especially pleaded in this action; the nature, cause and details said accident being specifically set forth in plaintiff's statement which is made a part hereof. That plaintiff's counsel has requested defendant's counsel to admit said car was being thus transported but said counsel has not so agreed.

That the books or writings, records or documents, pertinent to the issue herein and now in possession defendant consist of certain bill or bills of lading, manifest or manifests, car record or records, car distribution books or records, and any other books or record or reports, showing the receipt by defendant of said shovel car and where received and when received, and transportation thereof and destination thereof, being all such pertinent to the issue herein, or any such necessary to show receipt and movement said car which is exceedingly material evidence to plaintiff, and all same being exclusively in the power of defendant.

Wherefore the deponent for plaintiff moves in open court this 16th Dec. 1907 and applies for a rule on defendant to produce said books, papers, records, reports relating to its receipt, movement, and transportation and destination said shovel car which caused said accident in its DuBois, Pa., yards on Aug. 5th, 1900, for which this action has been instituted by plaintiff against defendant, all same being in its custody or possession or control, or in the possession or control of its officers, agents, servants or employees, in order that plaintiff may offer same in evidence at the trial this action if so desired.

A. J. TRUITT.

Sworn to and subscribed before me this 14th day of Dec. A. D. 1907.

CYRUS H. BLOOD, *Pro.*

And now Dec. 16, 1907, on due consideration above application, affidavit and motion of plaintiff pro A. J. Truitt her attorney, rule granted on the Buffalo, Rochester and Pittsburg Railway Company, defendant, to show cause why it should not produce at the trial of within mentioned case the books, records, papers, reports, writings, specifically set forth in above application, affidavit and motion, now in the possession of defendant or its servants, employees, officers or agents. Rule returnable December 30, 1907.

By the Court.

57 To C. Z. Gordon, Esq., and C. H. M'Cauley, Esq. Attys. for
Buf. Roch. & Pgh. Ry. Co., deft.

Please take notice that plaintiff pro attorney has filed her affidavit in the within above action for the production of books, writings, records, etc. and that the Honorable Court has granted a rule on the defendant to show cause why the defendant should not do so—why an order should not be made on defendant to produce on the trial certain books and writings and records etc. as set forth and described in the affidavit, a copy of which and said order herewith appears.

Rule returnable Dec. 30, 1907.

A. J. TRUITT,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,
County of Jefferson, ss:

Personally appeared A. J. Truitt who says he served within affidavit and rule on C. Z. Gordon, Esq., Atty. for the Buffalo, Rochester and Pittsburg Ry. Co. Defendant by giving to him a true and attested copy thereof as well as of above notice and informing him of the contents thereof on Dec. 16th 1907.

58

A. J. TRUITT.

Sworn and subscribed to before me Jan. 13th A. D. 1908.

CYRUS H. BLOOD, *Pro.*

No. 194 Apl. Term, 1901. Com. Pleas of Jefferson Co. Catharine Schlemmer v. Buffalo, Rochester and Pittsburg Ry. Co. Affidavit and Motion of plff. for rule on Deft. to produce writings etc. at trial. Dec. 16, 1907, presented and filed in open court. See Decree inside.

59 In the Court of Common Pleas of Jefferson County.

No. 194, of April Term 1901.

CATHARINE SCHLEMMER

vs.

BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Trespasa.

And now, December 20th, 1907, on request of counsel for defendant, an exception is noted and bill sealed to the order of December 16th, 1907, granting a rule to show cause in the above stated case why the defendant company should not produce at the trial the books, records, papers, reports and writings as shown in the motion on which the rule was granted.

HARRY R. WILSON, [SEAL.]

P. J. of the 18th Judicial District Specially Presiding.

60

194 of April Term 1901. Catharine Schlemmer v. The Buffalo, Rochester & Pittsburgh Railway Co. Bill of Exceptions. Filed Decr. 23, 1907.

61 In the Court of Common Pleas of Jefferson County.

No. 194, of April Term 1901.

CATHARINE CRAIG

vs.

BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

JEFFERSON COUNTY ss:

And now, Dec. 24, 1907, plaintiff in above action by her attorney A. J. Truitt, pursuant to Rule of Court No. 20 hereby files and makes the following amendments to her Statement of Claim as heretofore filed in above action on May 17th, A. D. 1901, in said Court—said Amendments thereto being as follows:

First. The plaintiff claims of defendant the sum of Twenty thousand dollars which is justly due and payable to her by defendant in this action instead of the Ten Thousand dollars claimed in said original statement. Said twenty thousand dollars being the pecuniary loss sustained by her and her said children by reason of defendant's negligence and carelessness all as set forth in said original statement—and said original statement is thus amended.

Second. By adding to the following words in said original statement, viz. "Said coupler was not a legal coupler or coupling as required by existing laws, on date decedent's death, viz.: on August 5, A. D. 1900" the following viz: as it violated the provisions of the Statute of the United States relating to safety couplers, which statute was approved March 2nd, 1893, by the 52nd Congress, second session, chapter 196, and which is especially pleaded as part said existing laws, And said original statement is also amended.

A. J. TRUITT,
Attorney for Plaintiff.

63 No. 194 of April Term 1901. Court Com. Pleas Jefferson Co. Catharine Craig v. Buffalo, Rochester and Pittsburg Railway Co. Amendments to Plaintiff Statement.

Dec. 24th, 1907, Notice in writing given to C. Z. Gordon Esq., attorney for defendant of the filing hereof and a true copy hereof given to him.

Filed Dec. 24, 1907. Truitt.

CYRUS H. BLOOD, *Prothonotary.*

64 In the Court of Common Pleas of Jefferson Co.

No. 194 of April Term, 1901.

CATHARINE CRAIG

v.

BUFFALO, ROCHESTER AND PITTSBURG RY. CO.

Whereas plaintiff by her attorney, A. J. Truitt did on Dec. 16th, A. D. 1907 in above action present her petition for defendant to produce on the trial of said action fixed for Jan. 27th, A. D. 1908, certain of its books, records, writings, etc. showing its receipt a certain shovel car and its transportation thereof and the destination thereof all of which was shown in said petition to be exceedingly material evidence for plaintiff in said trial and exclusively within power of defendant to produce and on which petition your Honorable Court granted a Rule eo die on defendant to show cause why an order should not be made on defendant to produce on said trial said books, writings, etc. all as fully set forth in said petition, and a copy said petition and rule and order thereon having been served on defendant's attorney C. Z. Gordon, Esq., same day to wit Dec. 16th, A. D. 1907, returnable Dec. 30th, A. D. 1908, and no answer having been made thereto, only exception taken by defendant

65 and bill sealed Dec. 20, 1907.

Now Jan. 13th, A. D. 1908, plaintiff by her said attorney moves in open Court that said rule be made absolute and that defendant produce said books, writings, records, etc. all as fully set forth in said original petition therefor at the trial thus affixed for Jan. 27th, 1908, a true copy this motion and the granting thereof to be served on defendant's attorney, and that it is now so ordered.

A. J. TRUITT,
Atty. for Pl'ff.

66 No. 194 Apr. Tr. 1901. C. P. Jefferson Co. Catharine Craig v. B. R. & P. Ry. Co. Motion to make rule granted Dec. 16th 1907 for production certain books, etc. on trial Jan. 27, 1908, absolute. Truitt.

67 And now, Jan'y 13, 1908, motion granted, and the rule for production of records, papers, &c. in the possession and control of the defendant, showing the receipt of said shovel car *ny* it, when and where received, and the destination thereof, is made absolute, and the defendant required to produce said records, papers &c., on the trial of said case, unless the defendant in lieu thereof desires to admit of record, by writing filed, that said shovel car was being transported by it in interstate commerce at the time of the injury to the decedent thereby complained of in this action.

By the Court.

JOHN W. REED, *Prest. Judge.*

Same day defendant excepts to said order of the Court, and at its request bill of exceptions sealed.

JOHN W. REED, [SEAL.]
Pres. Judge.

68 In the Court of Common Pleas of Jefferson County, Pa.

No. 194, of April Term, 1901.

CATHARINE CRAIG

v.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Motion to Strike Off Amended Statement of Claim.

January 13th, 1908, the defendant company, by its attorneys, in open Court, moves the Court to strike off the amended statement of claim filed by the plaintiff on the 24th day of December, A. D. 1907, for the reason that said amended statement introduces a new cause of action more than five years after the right of action was barred by the statute of limitations.

C. H. M'CAULEY,

C. Z. GORDON,

Attorneys for the Defendant.

69 No. 194, of April Term, 1901. Catharine Craig, (formerly Schlemmer) v. The Buffalo, Rochester & Pittsburg Railway Company. Motion to strike off amended statement of claim. Jan'y 13, 1908, Presented and filed in open court and Rule to show cause granted Ret. 4th Monday of January. By the Court. C. H. M'Cauley, C. Z. Gordon, Deft's Att'ys.

70 In the Court of Common Pleas of Jefferson County.

No. 194, April Term, 1901.

CATHARINE SCHLEMMER

vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

The Court is respectfully requested to instruct the jury:

1. Under the evidence in this case the shovel car Schlemmer, the deceased, was endeavoring to couple to the caboose, was a car used in moving interstate traffic in contemplation of the Act of Congress, of March 2, 1893, Chapter 196.

2. If the shovel car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, and the defendant company was hauling or permitting it to be hauled on its line of railroad, it was a violation by the defendant company

of the provisions of the Act of Congress, of March 2, 1893, Chapter 196.

3. If the shovel car was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars, then,
71 under the Act of Congress, of March 2, 1893, Chapter 196, Schlemmer, the deceased, in his effort to couple the cars, is not to be deemed to have assumed the risk occasioned by the use of the shovel car by the defendant company in hauling it as it was doing.

4. If the defendant company was a common carrier engaged in interstate commerce by railroad, and was hauling or permitting to be hauled on its line of railroad the shovel car in question from a point in the state of New York to a point in the state of Pennsylvania, and such car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, and Schlemmer, the deceased, an employee of the defendant company was injured and killed by such car, in use contrary to the provisions of the Act of Congress, of March 2, 1893, Chapter 196, while he was endeavoring to couple it to the caboose, then, by the terms of said act, he was and is absolved from any imputation of the assumption of the risk thereby occasioned.

5. Under the principle stated in the last preceding point, Schlemmer would still be free from any charge or inference of having assumed the risk, notwithstanding, he may have known or been told of the danger and cautioned against it.

6. Even if Schlemmer did slightly miscalculate the height
72 of the car behind him while his duty required him in his crouching position to direct the heavy drawbar moving above him into the small slot in the automatic coupler on the caboose in front, in the dusk of the evening, such miscalculation under such circumstances was a risk which, under the Act of Congress, of March 2, 1893, Chapter 196, Schlemmer did not assume.

7. If the defendant was violating the act of Congress March 2, 1893, Chapter 196, by hauling or permitting the shovel car to be hauled on its line of railroad without being equipped with the couplers required by that act, and Schlemmer was injured and killed by that car so in use, he is not chargeable by the defendant with contributory negligence.

8. There is no presumption of negligence on the part of Schlemmer after he entered upon the discharge of his duty to make the coupling, and the burden of proving contributory negligence on his part, if alleged by the defendant, is upon the defendant.

9. That if the jury find from the weight of the evidence that there were different ways in which the coupling might have been made, one of which was safer than the other, then, it was the duty of defendant to have instructed Schlemmer as to the way in which it ought to have been done.

10. That Schlemmer as an employee of defendant railway com-

pany was held only to the exercise of ordinary care in the performance of his duties in the line of his employment, and was not held to that extreme care which would absolutely eliminate all possibility of injury.

11. If Schlemmer exercised the degree of care and caution incumbent upon a man of ordinary prudence in the same calling under the circumstances in which he was placed, he would not be guilty of contributory negligence that would defeat the plaintiff's right of recovery.

A. J. TRUITT,
CHARLES CORBET,
Attorneys for Plaintiff.

Catherine Schlemmer vs. The Buffalo, Rochester and Pittsburgh Railway Company. Plaintiff's Points. Filed January 29, 1908. A. J. Truitt. Charles Corbet.

In the Court of Common Pleas of Jefferson Co., Pa.

No. 194. April Term, 1901.

CATHARINE SCHLEMMER, now CATHARINE CRAIG,
vs.
BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY CO.

Trespass.

The Court is respectfully requested to charge the Jury as follows:

First. That under all the evidence and pleadings in this case, the verdict must be for the defendant.

Second. That Catharine Schlemmer, having married Patrick Craig on September 25th, 1904, she then ceased to be the widow of Adam Schlemmer, deceased, within the meaning of the Act of April 25th, 1855, and became the wife of Patrick Craig, and there can be no recovery in this action.

Third. That Catharine Schlemmer, having married Patrick Craig on September 25th, 1904, she then ceased to be the widow of Adam Schlemmer, and thereby legally divested herself of all right to recover damages on account of the death of Adam Schlemmer, and there can be no recovery in this action.

Fourth. That there is no proof of any negligence on the part of the defendant in this cause.

Fifth. That the evidence in this case proves conclusively that Adam Schlemmer, deceased, after being duly warned and instructed, failed or neglected to keep his head at least as low as the bottom of the steam shovel; that this omission was the sole fault of the decedent, and that said decedent was guilty of contributory negligence and there can be no recovery in this action.

Sixth. That the uncontradicted evidence establishes the fact that the coupling in question was of the simplest form used on railroads; that Adam Schlemmer was a man of experience in making coup-

lings and knew the manner of making the same, and in addition thereto was duly warned and instructed as to the manner of making the coupling in question; that he failed to heed the warning, obey the instructions and exercise reasonable care in making said coupling, and was, therefore, guilty of contributory negligence and there can be no recovery in this case.

JNO. G. WHITMORE,
C. Z. GORDON,
C. H. M'CAULEY,
Attorneys for Defendant.

January 29th, 1908.

77 Defendant's Points. Filed January 29, 1908.

78 In the Court of Common Plea- of the County of Jefferson.

No. 194 of April —, 1901.

CATHARINE SCHLEMMER, now CATHARINE CRAIG,
versus
THE BUFFALO, ROCHESTER AND PITTSBURG RY. CO.

Verdict.

And now to wit: January 29, 1908, we the Jurors empannelled in the above entitled case, find for Plaintiff amount of damage Ten Thousand dollars (10,000).

J. T. LUTHER.

79 No. 194 April —, 1908. Catharine Schlemmer now Catharine Craig versus The Buffalo, Rochester & Pittsburg Ry. Co. Verdict. Filed January 29, 1908.

80 In the Court of Common Pleas of Jefferson County.

No. 194, April Term, 1901.

CATHARINE SCHLEMMER, now CATHARINE CRAIG,
vs.
BUFFALO, ROCHESTER AND PITTSBURG RY. CO.

Now January 29th, 1908, defendant by its attorneys renews its exception to the charge of the Court and the answer to defendant's points and to plaintiff's first, second, third, fourth, fifth, sixth, eighth, ninth, tenth and eleventh points, and say- that the court erred in submitting the case to the jury and should enter judgment for the defendant non obstante veredicto, for the following reasons:

1. That under all the evidence and pleadings in this case the verdict must be for the defendant.

2. That Catharine Schlemmer having married Patrick Craig on

Sept. 25th, 1904, she then ceased to be the widow of Adam Schlemmer, deceased, within the meaning of the Act of April 25th, 1855, and became the wife of Patrick Craig, and there can be no recovery in this action.

3. That Catharine Schlemmer having married Patrick
81 Craig on Sept. 25th, 1904, she then ceased to be the widow of Adam Schlemmer and thereby legally divested herself of all right to recover damages on account of the death of Adam Schlemmer and there can be no recovery in this action.

4. That there is no proof of any negligence on the part of the defendant in this case.

5. That the evidence in this case proves conclusively that Adam Schlemmer, deceased, after being duly warned and instructed, failed or neglected to keep his head at least as low as the bottom of the steam shovel; that this omission was the sole fault of the decedent, and that said decedent was guilty of contributory negligence and there can be no recovery in this action.

6. That the uncontradicted evidence establishes the fact that the coupling in question was of the simplest form used on railroads; that Adam Schlemmer was a man of experience in making couplings and knew the manner of making the same and in addition thereto was duly warned and instructed as to the manner of making the coupling in question; that he failed to heed the warning, obey the instructions and exercise reasonable care in making said coupling, and was, therefore, guilty of contributory negligence and there can be no recovery in this case.

7. That the verdict is against the weight of the evidence.

82 8. That the verdict is against the charge of the court.

9. That the burden of proof is upon the plaintiff to show negligence on the part of the defendant clear of contributory negligence on the part of the decedent, and the evidence in the case shows conclusively that decedent was guilty of contributory negligence and does not show any negligence on the part of the defendant.

10. That the verdict is excessive.

C. Z. GORDON,

C. H. M'CAULEY,

JNO. G. WHITMORE,

Attorneys for Defendant.

Now January 29th, 1908, the defendant by its attorneys moves the Court for judgment for defendant, non obstante veredicto upon the whole record, and to order and direct that all the evidence taken upon the trial be duly certified and filed so as to become part of the record.

C. Z. GORDON,

C. H. M'CAULEY,

JNO. G. WHITMORE,

Attorneys for Defendant.

CATHARINE SCHLEMMER, now CATHARINE CRAIG,
 vs.
 B., R. & P. Ry. Co.

Now, January 29, 1908, exception noted and bill sealed for the defendant.

And a rule to show cause granted why judgment should not be entered non obstante veredicto, returnable to next Argument Court; and it is ordered and decreed that all evidence taken upon the trial be duly certified and filed and made a part of the record.

By the Court,

JOHN W. REED,
Pres't Judge.

84 Catherine Schlemmer, now Catherine Craig vs. The Buffalo, Rochester and Pittsburgh Railway Company. Rule for judgment non obstante veredicto. C. F. Jefferson County. No. 194. April Term, 1901. C. H. McCauley, John F. Whitmore, and C. Z. Gordon, for rule; A. J. Truitt and Charles Corbet, contra.

Opinion of the Court.

JUNE 5, 1908.

REED, P. J.:

In considering this rule for judgment non obstante veredicto, the first important question is whether the evidence warranted a submission of the case to the jury. The deceased, Adam Schlemmer, lost his life while in the employment of the defendant, and this action was brought by his widow to recover the damages to which she and his minor children were entitled on account of the
 85 unlawful negligence of the defendant, which it was alleged occasioned his death. The accident which resulted in his death occurred between 8 and 9 o'clock, the evening of August 5, 1900, while he was attempting to couple a caboose to a steam shovel attached to the rear of a train of 17 cars. These cars were owned by the defendant and were loaded with dump cars, etc., and, with the steam shovel which was being transported on its own trucks, constituted a contractor's outfit. This outfit was owned by T. F. Ryan, and was being transported for him by the defendant from Limestone, in the State of New York, to Glenshaw, in the state of Pennsylvania. It was in charge of James Casey, an employee of the owner, who was looking after it in route. The outfit reached Du Bois, Pa., Sunday evening, and was placed on one of the defendant's side tracks. It remained there about 40 minutes when it was pulled out on the main track again and backed up a short distance to where a caboose was standing for the purpose of attaching the caboose to the steam shovel at the rear of the train. This steam shovel had the general appearance of a box car, but was readily distinguishable from such car. It could not be used for the trans-

portation of either freight or passengers, and its general appearance and construction were such as to attract the attention of the most casual observer. The rear end of it projected out over the truck

about 3 feet for the protection of the machinery. It was
86 equipped with a draw-bar coupler fastened in a single pocket draw-head underneath this projection, and from $2\frac{1}{2}$ to 3 feet back from the end of the same. The draw bar was about 3 feet long and weighed about 80 pounds. The free end hung down at an angle of about 30 degrees. This end had an eye or hole in it and when hanging down was about 28 inches above the rails of the track, and about 9 inches below the bottom of the steam shovel. When raised to the level of the bottom of the shovel car it extended 6 or 7 inches beyond the end of this projection on the same, and in making a coupling with the caboose it would have to be raised up 5 or 6 inches and guided into the slot of the coupler on the caboose, which was an automatic coupler. This false work at the end of the steam shovel, which projected out for the protection of the machinery, was higher than the automatic coupler on the caboose, and if the person attempting to make the coupling failed to do so, it would pass over the top of the automatic coupler and come in immediate contact with the end or splash-boards of the caboose. There is no testimony to show that the deceased had any experience with steam shovels, or that he saw this one before it was pulled out of the siding at Du Bois, and backed up on the main track for the purpose of attaching the caboose to it. He was an experienced

brakeman, however and had worked at the business for 15 or
87 16 years. He was on the caboose with the man who had charge of this contractor's outfit when it was taken from the siding and was backed up the main track. He saw it, and had ample time and opportunity for observing the steam shovel attached to the rear of the train. It is earnestly contended that he did not know the conditions which confronted him in making this coupling, and that he did not have time to discover or to observe its dangers. This contention, however, is irreconcilable not only with the undisputed and positive testimony bearing on these matters, but also with all the facts and circumstances in the case having any relevancy to them. Every witness called by the plaintiff, who testified with reference to the character of the coupler on the steam shovel, and how the coupling was required to be made with it, stated that both could be seen at a glance; also that the draw-bar coupler was of very simple construction and the manner of its operation easily and readily understood. This is so manifest, even to one without experience as a brakeman, that evidence to prove it seems superfluous. It is further contended that both the caboose and the steam shovel were without buffers to prevent the ends of the cars from coming together on failure to make the coupling. It was not usual or customary to have buffers on a caboose, and this was undoubtedly known to the deceased. Moreover, he was in and about this particular caboose long enough to observe this. The construction of the steam shovel was such as to render buffers useless,
88 and this could also be seen at a glance. But it is still further

contended that the deceased should have been informed that this false work of the steam shovel was higher than the automatic coupler on the caboose, and would go over the top of the same on failure to make the coupling. The witnesses called by the plaintiff to testify to these facts noticed these conditions with apparently no more opportunity, and less occasion for observing them, than had the deceased. Isaac Hoover, called by the plaintiff, testified in substance that he had had 2½ years' experience railroading; that on this particular evening he was sitting on his porch 50 or 60 feet from where this accident occurred; that from this distance he noticed this shovel car and draw-bar coupler; that both were so unusual and of such peculiar construction as to attract attention, and that he remarked to a friend sitting with him on the porch: "We will see if he makes the coupling."

This witness testified on direct Examination:

Q. What do you know about them having bumpers on?

A. Which?

Q. The shovel car or the caboose?

A. I never saw any bumpers on a caboose. In all my experience on the B. R. & P. I never saw any bumpers on a caboose.

Q. On that shovel car, had it any on?

A. I don't believe it had. The shovel extended out over the car.

Q. Did you notice whether the bottom of the shovel car was higher or lower than the coupling on the caboose?

89 A. I do not understand.

Q. Did you notice whether the end—the bottom of the shovel car—was higher or lower than the automatic coupler on the caboose?

A. It was higher. The shovel extended out over the car, yes, sir.

Q. Would the end of it strike the automatic coupling, or go over it?

A. Go over the top of it.

Q. Did it go over it?

A. Yes, sir, it certainly did.

Q. And how as to the end of the shovel car going against the end of the caboose; Did they go smack together?

A. They certainly did. They went right like two boards would go together flat-sided.

That was all there was. The witness was further asked on direct examination the following questions:

Q. Was there anything there connected with that he ought to have been instructed about?

A. I suppose there was, if he did not notice those things.

Q. What was there there that he should have been instructed about?

A. About that extending out over there. If he would have kept down, if he did not he would get killed—if he got over there. Anybody knows that. It did kill him.

The court asked the witness this question:

Q. Just state, if you can, what instruction you think he ought to have had, if any, in making that coupling with safety?

A. He was an experienced man. How long he had worked I

don't know. Probably if some one had said to keep down, or had watched him, or something like that, or had drawn his attention to it, he might have kept down. I don't know.

90 The witness further testified on direct examination:

Q. Should he have been told that? (that if he missed the coupling the cars would come together).

A. Probably he knew. I don't know.

Q. Would he naturally observe that, that they would come together the way they did?

A. I don't know. Probably he would and probably he would not. I would not say.

I think Mr. Hoover's testimony is a fair sample of all the testimony on this subject, and it does not appear from his testimony that he had any better opportunity for observing the facts testified to than had the deceased. If the witness observed that the end of the shovel car was higher than the automatic coupler on the caboose, and would go over the top of it, without any special duty devolving upon him to observe the same, the deceased, whose duty it was to pay particular attention to the cars he was coupling, could certainly have noticed these conditions.

HARRY C. COATES, the yard conductor called by the defendant, testified that the deceased ought to have known that the shovel car would go over the automatic coupler; that a man by looking at it would notice that, and in fact could not help but notice it. The only reasonable inference that can be drawn from all the facts and circumstances in the case, leaving out of consideration the direct and positive undisputed testimony with reference thereto, is that the deceased knew the caboose was equipped with an automatic coupler and that the steam shovel was equipped with a draw-bar coupler;

91 that he knew how to make this coupling and what was required of him to make it in safety; also that he knew if he got his head or any part of his body between the ends of the cars, in attempting to make the coupling, it would be crushed. There were three persons present, however, at the time of the accident who advised the deceased, before he attempted to make the coupling, of the danger of making the same, and instructed him how to make it and what was required of him to make it in safety. Two of them, James Casey, who was in charge of the contractor's outfit of which this steam shovel was a part, and Harry C. Coates, the Du Bois yard Conductor, advised him that the safer way was to push the caboose up by hand to the steam shovel, and when he rejected this advice he was told at least three times to get down or keep down so as not to get caught and crushed between the cars.

Mr. Casey testified that he and the deceased were in the caboose talking about some parties they knew in Altoona; that while they were talking the deceased saw the train backing up and went out on the front part of the caboose. The witness said to him "We had better shove that up by hand, the same as we did at Bradford; that is a dangerous coupling to make." The deceased did not make immediate reply, but got down on the ground, and then said, "Oh, hell, back up." The yard conductor, Mr. Coates, testified that he

walked up to the deceased and "told him that they had better shove that caboose on by hand." He replied to this "never mind," I will make this coupling." The witness then said to him, "Well, 92 you will have to get down," and as the cars came closer together he saw the deceased was too high, and twice called to him to get down. The conductor of the train crew, Harry C. Neilson, testified that they backed up the train within a few feet of the caboose and stopped; that the deceased came to him and said: "I will enter this draw-bar and you drop the pin." The witness replied, "no, I will set the pin—it will drop itself."

The witness further testified that he talked to him about making this coupling and told him: "You must be very careful now and keep your head down so as not to get mashed in between those cars." This witness also states that if the deceased had obeyed instructions and had kept down and back under the false work of the shovel car there would have been no chance for him to have been caught. It is unnecessary to prolong this opinion by a further recital of the testimony on the questions of the deceased's knowledge of the kind of coupling he was about to make; the dangers incident to making the same, and the safest way to make it. All the testimony, positive and circumstantial, leads to but one conclusion, and admits of no other, and that is that the deceased was perfectly familiar with all these things and was fully advised regarding the same. The question which arises out of this state of facts is, was he guilty of negligence, in the performance of his duty, which contributed to the injury causing his death? The testimony does not warrant the conclusion that, in making this coupling, the risk was so obvious 93 and the danger so imminent, that an ordinarily careful and prudent brakeman would not attempt it, as to fix the deceased with negligence on this ground. But it forces the conclusion that he was guilty of contributory negligence in two particulars: First in failing to exercise care according to the circumstances in making the coupling in the way he attempted to make it, and, second, in not adopting the safer way pointed out to him for making the same. As to the first ground there is no substantial difference in the testimony offered on this and on the former trial, and upon which the deceased in the former trial was adjudged guilty of contributory negligence. The testimony on the former trial, however, did not so clearly show this negligence as it does on the present trial, and it therefore admitted of a contention which was not warranted, on which the final decision of the case was based, and which is now shown to be groundless. It was contended then and is contended now that the injury to the deceased is chargeable to the assumption of risk, and was the result of his miscalculating the height of the car behind him by an inch while, in a crouching position, he was attempting to make the coupling as his duty required him. If his duty required him, in making the coupling, to be in the position, which he voluntarily and, according to the testimony, unnecessarily placed himself, and he exercised ordinary care and prudence, according to the 94 known dangers of such position, his miscalculating the height of the car by an inch or more would admittedly be involved in assumption of risk. But the fact is, and the evidence now before

the court clearly and unequivocally shows that the deceased went about the performance of his duty in a very careless and indifferent manner, and without any necessity whatsoever took a position involving the greatest possible danger in attempting to make this coupling. In order to make it, it was necessary for him to get down under the shovel car, between the rails of the track, and to raise the draw bar on the shovel car 5 or 6 inches and guide it into the slot in the automatic coupler on the caboose. If he had done this he could not have been injured in the manner that he was. There was plenty of room under the projection on the shovel car for him to operate the draw bar, and the raising of his head or his body could not have resulted in anything more serious than coming in contact with the bottom of the car, or with this false work overhanging the draw-bar which projected about 3 feet beyond the truck of the car. This projection on the shovel car was manifestly a protection against injury in making the coupling, and not a source of danger as contended on the part of the plaintiff. It does not require direct proof, or the opinion of experts, to establish this fact. But if necessary it

95 may be found in the testimony of the train conductor, Mr. Neilson, who testified that if the deceased had stayed "back under this shovel car, this part that projected out, there would have been no chance for him to get caught." Again—"the coupling could be made by a man holding his head down underneath this false work, the same as I did. I made the coupling and my head is not crushed."

The deceased in the face of repeated warnings to keep down, and to be careful not to get caught between the ends of the cars, took a position which it was not necessary for him to take and which exposed him to the very danger against which he was warned. He took hold of the caboose with one hand and of the draw-bar on the shovel car with the other hand, and thus negligently and unnecessarily put himself in a position that if he raised up above the bottom of the cars he would be caught between the ends of the same. In this he was guilty of negligence contributing to his injury, which, under the settled law of this state, bars a recovery for damages on account of such injury.

In the second place he was told how this coupling had been made at Bradford, by pushing the caboose by hand against the shovel car, and was told that it was a difficult and dangerous coupling to make and that the safe way to make it was by pushing the caboose up by hand against the shovel car. This method of making the coupling was unquestionably the safer way to make it, and inasmuch as

96 the deceased had the necessary assistance at hand to make it in this way, it was his duty to pursue the safer course, and a failure to do so fixes him with such negligence as bars a recovery. It is common sense as well as law that if an employee has a choice of ways known to him of doing a thing, one safe and the other unsafe, he is required to take the safe way of doing it. If he voluntarily takes a risk to which his employment does not necessarily expose him, it is negligence on his part, and if injured thereby he has no one but himself to blame. The question of assumption of risk is injected into this case without any evidence to support it. The risk

of injury which the deceased took in this case was not involved in his contract of employment. It was one that he deliberately created for himself. Conceding that it was his duty to make this coupling, it was equally his duty to exercise ordinary care and prudence in its performance. In this latter duty he utterly failed, and without any necessity therefor exposed himself to a risk and danger that was imminent, which by the exercise of ordinary care and prudence he could have and should have avoided, and because he did not do so was injured. This certainly is negligence, and is clearly distinguishable from assumption of risk, or a risk necessarily incident to the employment in which he was engaged. Before the question of assumption of risk could fairly arise in this case, it is necessary to

97 assume, contrary to the evidence, that the deceased undertook to make this coupling in accordance with the express instructions of the defendant, or else by its implied instructions in that he was discharging a duty of his employment in the way and manner that he was expected or required to perform the same. In this connection it is well to remember that the defendant's cars were not equipped with draw-bar couplers. They were generally fitted with automatic couplers, and those not so equipped were fitted with the link and pin coupler. Where automatic couplers were used the cars coupled by impact, while the brakeman stood clear of the same. Where the link and pin coupler was used the ends of the cars were provided with buffers so that they could not come close together. The brakeman, in making the link and pin coupling, stood between the ends of the cars, clear of the buffers, and with a stick furnished him by the defendant, and which he was required to use, he lifted the link into position for the dropping of the pin. This shovel car and draw-bar coupler were both exceptional, and there is no evidence of any express instructions by the defendant with reference to how the coupling should be made, and none can be inferred or implied from the usual and ordinary method of making the same, since it does not appear that any such prior coupling had ever been made on the defendant's road. In these circumstances, the deceased

98 who was an experienced brakeman was required to exercise care and caution according to the circumstances to avoid injury in making this exceptional coupling. But the evidence shows that he failed to do this, and therefore was clearly guilty of negligence contributing to his injury.

The defendant further contends that no unlawful negligence on its part has been shown, and for this reason there can be no recovery against it. The only negligence disclosed is the failure to equip, or to require this shovel car to be equipped with an automatic coupler before undertaking to transport the same over its tracks. To establish the defendant's negligence in this particular, the Act of Congress passed March 2, 1893, regulating the equipment with automatic couplers of all cars used in moving interstate commerce, is cited. The statute provides, *inter alia*, that it shall be unlawful for any common carrier, engaged in interstate commerce, "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by

99 impact." If it were an open question, I would be inclined to the opinion that this steam shovel, which was not and could not be used for transporting purposes, was not a "car used in moving interstate traffic," within the meaning of the statute, which is penal in its character and to be strictly construed. But it has been decided otherwise in this very case, and therefore I accept the decision as final.

The defendant also contends that inasmuch as the plaintiff has remarried since she brought this action, she is no longer the widow of the deceased, and consequently cannot maintain it. The question thus suggested may have both merit and law to support it, but it is unnecessary for me to decide it as I am convinced the action of the plaintiff is barred by the contributory negligence of the deceased, and this opinion is already expanded beyond its importance.

Upon the trial of this cause, I was persuaded that the negligence of the deceased contributing to his injury was so manifest that a verdict for the plaintiff could not be sustained, but to avoid a re-trial of the case, in the event that my view of the testimony might be found to be erroneous, I concluded to take the verdict of the jury thereon with the reserved right to enter judgment later in accordance with the requests of the defendant for binding instructions, if the verdict made such action necessary. Further careful consideration of the testimony has confirmed the conviction which it produced in my mind at the time of the trial, and therefore I am constrained to enter judgment on it for the defendant, notwithstanding the verdict rendered in favor of the plaintiff.

And now, June 5, 1908, the rule for judgment non obstante veredicto is made absolute, and judgment upon the whole
100 record is now entered in favor of the defendant.

By the Court:

JOHN W. REED,
President Judge.

Same day the plaintiff excepts to the ruling and judgment of the court, and at her request bill of exception sealed.

JOHN W. REED, [SEAL.]
President Judge.

101 No. 194 April T. 1901. Catherine Schlemmer now Catherine Craig vs. The Buffalo, Rochester and Pittsburgh Railway Company. (Rule for judgment non obstante veredicto.) Opinion by the Court. Filed June 5, 1908.

102 In the Court of Common Pleas of Jefferson County, Pennsylvania.

No. 194, April Term, 1901.

CATHERINE SCHLEMMER, now CATHERINE CRAIG,
vs.

THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

Stenographer's Transcript of Notes of Trial.

Filed February 27, 1908.

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Fascett, Mrs. Christina (Deposition).....
Gensamer, Dorsey E.....
Hoover, Isaac.....
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Scott, J. A. Esq.....
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Defendant.		
Casey, James.....
Coates, Harry C.....
Neilson, Harry C.....
Truitt, A. J. Esq.....
Charge to the jury.....

104 In the Court of Common Pleas of Jefferson County, Pennsylvania.

No. 194, April Term, 1901.

CATHERINE SCHLEMMER now CATHERINE CRAIG,
vs.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Trespass.

Stenographer's Transcript of Notes of Trial.

Tried at Brookville, Pa., beginning Monday, January 27, 1908, before the Honorable John W. Reed, president judge, regularly presiding, and a jury.

Jury sworn or affirmed at 3:40 o'clock P. M.

Appearances:

For the Plaintiff: A. J. Truitt, Esq., Punxsutawney, Pa. and Charles Corbet, Esq., Brookville, Pa.

For the defendant: C. Z. Gordon, Esq., Brookville, Pa., and C. H. McCauley and John G. Whitmore, Esqs., Ridgway, Pa.

105 Counsel for defendant re-present to the Court the motion of the defendant company made in open court and filed January 13, 1908, to strike off the plaintiff's amended statement of claim, on which motion to strike off a rule to show cause was granted by the Court when presented returnable on the 4th Monday of January, 1908.

By the COURT:

By reference to the original declaration we find this statement: "Said coupler was not a legal coupler or coupling as required by existing laws on date decedent's death, namely, on August 5, 1900. Defendant was transporting said shovel-car from Limestone, in the State of New York, through the state of Pennsylvania."

In view of this statement in the original declaration filed in the case, as well as the fact that this question was raised by the introduction of testimony on the former trial covering all of the facts in the second clause of the proposed amendment, the parties apparently at that time taking it for granted that the original declaration was sufficient to introduce such testimony, we think this amplification of the statement in the original declaration by the proposed amendment does not introduce a new cause of action: and the rule heretofore granted to strike off said amendment is therefore discharged.
106 and the motion refused: and a bill of exceptions is sealed to the defendant.

A. J. Truitt, Esq., opened to the jury for the plaintiff.

Mr. DORSEY E. GENSAMER, called as a witness by the plaintiff, sworn.

Examined by Mr. TRUITT:

Q. What is your occupation?

A. I am a railroad man.

Q. How long have you been a railroad man?

A. About 20 years.

Q. What do you do on the railroad now?

A. At the present time I am flagging. I am a flagman.

Q. What railroad do you work on?

A. The B. R. & P.

Q. The defendant in this case?

A. Yes, sir.

Q. Do you remember the evening Adam Schlemmer was killed?

A. Yes, sir.

Q. Where did that take place?

A. That took place at Du Bois.

107 Q. What State?

A. Pennsylvania.

- Q. Whereabouts in Du Bois.
A. At Brady street.
Q. On the line of this defendant railroad?
A. Yes, sir.
Q. Where it crosses Brady street?
A. Yes.
Q. Were you one of the same crew that Adam Schlemmer belonged to?
A. Yes, sir.
Q. On August 5, 1900, then, as I understand it, you were an employee of the defendant company?
A. Yes, sir.
Q. Was Adam Schlemmer?
A. Yes, sir, he was.
Q. On that date what were you doing for the defendant company?
A. I was what they consider a head brakeman, on the same crew.
Q. With Adam Schlemmer?
A. Yes, sir.
Q. What position had Adam Schlemmer that day?
A. He was the flagman.
Q. That we may understand it—where does the flagman stay?
In the caboose generally?
108 A. His position is on the rear end of the train generally; yes sir.
Q. The evening this occurred: what time in the evening was it?
A. As near as I can recollect about 8:55 or somewhere along there.
Q. Do you know whether it was dark or not?
A. It was dusk.
Q. Do you know whether any of you had your lanterns lit or not?
A. I believe we all had our lanterns lit at that time.
Q. What were you doing with them—giving signals?
A. To give signals.
Q. You know about that shovel car that evening, do you?
A. Yes, sir.
Q. Do you know where it had come from?
A. I know it came from the north. I don't know just exactly where it came from.
Q. Do you know when it got to Du Bois?
A. Do I know when it got there?
Q. Yes, sir.
A. I don't just remember when it got there, but shortly before we picked it up.
Q. On the same day?
A. On the same day, yes, sir.
109 Q. Just describe to the court and jury that shovel car. What kind of tucks did it have under it?
A. It had two four-wheel trucks, the same as any other ordinary cars.
Q. Four wheels under the front end and four under the rear end?
A. Yes, sir.
Q. And trucks the same as any other car. Now then, there was a platform over them, was there, or a bottom.

A. The bottom of the car was over the trucks, yes, sir.

Q. And then where was the shovel part? Was it built on that platform?

A. Oh, yes, The shovel was built on the platform, of course.

Q. When you first saw this train that had this shovel car to it where was it?

A. It was on the siding when we got it, at Du Bois.

Q. Was it part of a construction train, or was it not?

A. I believe it was, yes, sir.

Q. Do you know how many cars were in that construction train?

A. I think 17.

Q. And now do I understand you that this shovel car was on the end of those?

A. Yes; the shovel car was on the rear end.

Q. What was that construction train made up of? What do you mean by a construction train?

110 A. What I would mean by a construction train is a contractor's outfit, made up of ties, &c., that they use in construction work.

Q. Cars to construct railroad?

A. Yes, sir.

Q. What did you undertake to do with that train the first thing?

A. We were instructed to take that train to Punxsutawney from Du Bois.

Q. What did you do?

A. We pulled it out of the siding.

Q. And backed it up the main track, did you?

A. Yes, sir.

Q. What for?

A. We backed it up to couple onto the caboose.

Q. Then I understand you that you wanted the caboose on the rear end of the train?

A. Yes, sir.

Q. Had you ever seen that shovel car before you undertook that?

A. No, sir, I never did.

Q. How many shovel cars before that in all did you ever handle?

A. I never handled any before. I did not.

Q. How many did you ever see Adam Schlemmer handle?

A. I never saw Adam Schlemmer handle any.

111 Q. Coming to the end of that shovel car next to the caboose that you were going to try to couple there, just tell us what kind of a coupling was on the end of the shovel car where you were to couple onto the end of the caboose?

A. Do you want me to tell that?

Q. Yes, sir.

A. It was a draw bar coupling on the end of the steam shovel car.

Q. Where was that draw bar coupling fastened to the shovel car?

A. Underneath the body of the shovel car.

Q. Underneath the end of the shovel car.

A. Yes, sir, underneath the end.

Q. On the bottom of it?

- A. Yes, sir.
- Q. How far back from the end?
- A. That is more that I can tell you, just exactly.
- Q. About?
- A. I never measured it. I would not be able to just say how far back under there it was.
- Q. A couple of feet or two feet?
- A. It might possibly have been two feet under the body of the car.
- Q. Where it is fastened in there, what do you call that thing it is fastened in, that draw bar in there?
- 112 A. The draw-head.
- Q. The draw bar when it was fastened in there: what was the length or size of it?
- A. Three or four feet long, I suppose.
- Q. About four feet long. And about how wide?
- A. I don't know that it was wide. It was round.
- Q. Just describe it so the Court and jury will understand it.
- A. It was a round drawbar, as far as I can recall.
- Q. About how thick, then?
- A. I cannot remember how thick it was.
- Q. Was it an inch, two, three or four inches thick? Can you come anywhere near it?
- A. It would possibly weigh about 80 or 90 pounds,—the draw bar. As to the thickness I cannot say; I don't remember.
- Q. The free end of that draw bar: did it hang down?
- A. Yes, sir.
- Q. What was in that end; was it a hole in the free end?
- A. Yes, sir, there was a hole in the free end of it.
- Q. How was it fastened under the car to the draw-head?
- A. It was fastened to the draw head with a pin in it.
- Q. That end of the shovel car that this was on: can you describe that to the Court and jury—what it looked like, the shovel car? Did it go up like a car, that end?
- 113 A. The end of the shovel car, the body of the shovel projected out over the body of the trucks.
- Q. Did it come to a sort of a square end there?
- A. Yes, sir, it was a sort of a square end.
- Q. Just like any other car?
- A. Yes, sir, it was a square end.
- Q. Was it about the width of another car?
- A. Yes, sir; just about the width of a box car, I guess, or nearly so, anyway.
- Q. The platform that that was on: did you take notice of the thickness of it?
- A. No, I did not.
- Q. When that draw bar hung down can you tell how far down it hung or how far up from the ground?
- A. No, I would not be able to say just how far that hung down.
- Q. Was there any notch or opening above the draw bar in the shovel car, or did it just run over straight, the end of it?
- A. Just square—straight.

Q. And the square platform overhung the drawbar and the draw-head?

A. Yes, sir, that is the way I understand it.

Q. Were there any draw heads or bumpers on that shovel car?

A. There were no bumpers, no, sir.

Q. Just a straight end there?

114 A. Yes, sir.

Q. Was that an automatic coupler—that draw-bar coupler?

A. No, sir, it was not.

Q. Were there any drawheads that stuck out past the end of the shovel car?

A. No, sir, there were not.

Q. Coming to the caboose: what kind of a coupling did that have on it?

A. The caboose had a patent coupler on it.

Q. Was that anything like that model there in front of you?

A. It was a patent coupler, something similar to that. I don't suppose it was just like that. I don't remember just what kind of a coupler was on the caboose. It was a patent coupler, anyway.

Q. In case there had been another draw-bar coupling on the caboose, could you have coupled the caboose to the shovel car?

A. You mean a bar on the caboose like the one on the steam shovel?

Q. Yes, sir.

A. I don't see how you could have coupled it. You might have.

Mr. GORDON: What do you mean—two draw-bars together?

Q. Yes, sir.

115 A. I want a little understanding about that. You mean two of those long draw-bars together?

Q. Yes, sir.

A. Could you have coupled them?

Q. Yes, sir.

A. No, I don't think so.

Q. Would that draw bar couple by impact?

A. No, sir.

Q. What was necessary to couple it to the caboose?

A. It was main strength. That was all there was to it that I could see.

Q. Where would a man have to get?

A. Oh, a man would have to get down in under it to couple it, of course.

Q. As to the rails where would he have to get—across the rails or between them—to couple the draw bar to that?

A. You understand, this draw-bar was in the center of the track. A man would have to get in between the rails to raise that up. His arm would not be long enough.

Q. Did he have to do that while the cars were in motion, the train?

A. Oh, no.

Q. I mean the coupling: would it have to be in motion while he was guiding it there?

A. Oh, yes, he would have to enter that draw bar as the
116 cars were coming back.

Q. Usually in making a coupling does the engine push the train back to the caboose or do the men push the caboose up to the train?

A. Usually we back the train on to the caboose.

Q. Is not that the way it is always done?

A. Yes, sir.

Q. Then you say that he had to get down between the tracks and hold up that draw-bar?

A. Yes, sir.

Q. And where had he to put the free end of the draw bar?

A. Enter it into the draw head of the caboose.

Q. When he lifted that draw bar up there what had he to do with it to make the coupling?

A. He had to raise that draw bar up and enter it into the draw-head of the caboose.

Q. That is into that little slot of the automatic coupler?

A. Yes, sir.

Q. That was on the caboose?

A. Yes, sir, in this case it was.

Q. What was the size of the end of that draw-bar—how wide and thick?

A. What was the size of the draw-bar?

Q. Of the end of it that he was going to put in that
117 coupler there.

A. Oh, possibly about two inches thick.

By the COURT:

Q. That is the end of the draw bar?

A. Yes, sir, the end of the draw bar that went into the slot.

By Mr. TRUITT:

Q. You say he had to insert that in that slot in the automatic coupler?

A. Yes, sir.

Q. How large is the slot?

A. This is quite a question to me. I never measured it.

Q. You saw it, didn't you: you looked at it?

A. Oh, I said that the end of the draw bar was about two inches. The slot would be about two inches and a quarter—something a little larger than the end of the draw bar. I don't know exactly about that.

Q. After it was inserted in there then what about a pin?

A. Of course you had to drop a pin down in there and couple it in with the pin.

Q. Down through the automatic coupling and through the hole of the draw bar?

A. Yes, sir.

Q. And that held it?

A. Yes, sir.

118 Q. Where was Adam Schlemmer when you went back there with this shovel car? Was he waiting at the caboose?

A. When we backed up with the shovel car?

Q. Yes, sir.

A. He was at the caboose.

Q. Do you know whether Adam Schlemmer ever saw that before it went back there?

A. I don't think he ever did. I don't know, though; but I don't think he ever did.

Q. Did you go straight back with the train?

A. We backed right straight up onto the caboose.

Q. Did he go in just as it went back?

A. I am not able to say that. I was not right there.

Q. The end of the caboose: that automatic coupler: did it stick out from the end of the caboose?

A. Yes, sir.

Q. Where are they fastened?

A. They are fastened onto a draft gearing, right onto the end sill. The automatic part of it projects out about 8 or 10 inches from the sill of the caboose, I suppose.

Q. Sort of fastened under the caboose, are they?

A. Yes, sir. It is a draw head that fastens back under the car.

119 Q. And then that automatic coupler sticks out how far from the end of the car, or in this case the caboose: how far did it stick out from the caboose?

A. I am unable to say exactly. I suppose 8 or 10 inches, anyway.

Q. On the caboose was that end, that beam across there, straight across?

A. Yes, sir.

Q. And about how wide was the caboose?

A. I don't know just exactly how wide those cabooses are.

Q. They are about the width of a car?

A. Oh, yes, they are the width of a car. I don't know just exactly how wide they are.

Q. If the shovel car had on the same kind of a coupling that the caboose had—the same height—could the cars have come together?

A. Had the caboose and the shovel car the same kind of couplings?

Q. No. Had the shovel car had the same kind of a coupling on that the caboose had, the same height so that they would have coupled together, could they have come together?

Q. Stuck out?

Q. Yes, sir.

A. No, they could not have come together. If they had both been the same and stuck out the same from the end they could not have come together. If they were the same height in every respect they could not.

120 Q. How far apart would they be on each side of the coupling if they had both had automatic couplings on them like on the caboose?

A. As I said, the 10 inches one would have stuck out 10 inches.

and the other would have stuck out 10 inches. That would have been 20 inches between the body of the cars,—if that had been the case.

Q. Was that coupling an usual or unusual thing, on that shovel car?

A. On that shovel car?

Q. Yes, sir.

A. I cannot say about that shovel car.

Q. But that draw bar coupling: was that a usual or an unusual coupling?

A. You mean for that shovel car?

Q. No, itself unusual: was it an unusual or strange coupling?

A. You mean for that shovel car?

Q. No, generally. I mean for any kind of a car. Did you ever see it, in other words, any draw bar coupling before?

A. You mean is it a usual coupling?

Q. Yes, sir.

A. No, sir, it is not a usual coupling.

Q. Did you ever see a draw bar coupling before that time, between cars?

121 A. Not like that.

Q. Did you ever use one?

A. No, sir, I never did.

Q. Was it a dangerous coupling?

A. I cannot say it was a dangerous coupling, no.

Q. Was it anyways dangerous?

A. Oh, a man might learn to make that coupling as well as any other kind of a coupling.

Q. Do you mean by that that a man should be instructed how to make it, to make it safely, I mean?

A. Well, if a man never made one he should have some instructions.

Q. That a man by instructions and practice on it might couple it without getting injured. Is that it?

A. Well, yes.

Q. And that if he didn't have instructions and had not practiced on it that he was liable to get injured. Is that it?

Objected to as leading.

By the COURT: Yes, that is pretty leading, and argumentative, too.

Q. When a man went in there could he see the danger, all of it, from what you afterwards discovered?

122 A. No; a man jumping right into that could not just exactly see the danger, no, sir.

Q. How was it as to the shovel car being higher than the caboose or not?

A. I am unable to answer that question.

Q. Would the shovel car go over the automatic coupler or not?

Mr. M'CAULEY: He said he would not be able to answer.

(WITNESS:) I will tell you, Mr. Truitt. I don't know that part

of it. I was not there, and I never measured, of course: and I don't know anything about it.

Q. Do you know whether Adam Schlemmer was killed that evening?

A. Yes, sir, I know he was killed.

Q. How was he killed?

A. He was killed by the——

By Mr. M'CAULEY:

Q. Were you there at the time to see it?

A. Yes, sir, I was working on the crew.

Q. Were you there to see him killed?

A. I did not see him killed.

Q. Then you don't know how he was killed, except what some one told you?

A. If that goes, I cannot say, then.

Q. You did not see it, yourself?

A. No, I didn't see him killed.

123 By Mr. TRUITT:

Q. Did you examine that caboose and that shovel car and see where he was killed?

A. No, sir, I did not.

Q. Did you see him after he was killed?

A. Yes, sir, I saw him after he was killed.

Q. What had happened to kill him?

Objected to.

By the COURT: He may state what condition he was in, but he cannot state how he was killed, for he didn't see it.

A. I saw him when he was laying in the caboose.

Q. And what had killed him?

By the COURT: How could he tell that if he did not see it?

Q. Could you see anything about him that showed he had been injured?

A. Yes, sir.

Q. What did you see?

A. I saw the blood. His head seemed to be bruised.

Q. Whereabouts?

A. The top of his head.

Q. About how much of it?

124 A. Possibly an inch or so.

Q. Of the top of his head?

A. I took particular notice to that part of it.

Q. That caboose: had it on it what they call a splash-board?

A. Yes, sir, it had a splash board.

Q. Do you call it a splash-board, or what is it? What is the name of it?

A. That is nearly right. That is about right. That is what we call it.

Q. Describe to the court and jury where that splash board is on the caboose.

Q. That splash board is up right at the end of the platform of the caboose, right opposite to the rail, right up over the rail.

Q. The end of the caboose—the steps to go up there?

A. Oh, no, the splash board is right at the end, over the rail, right in front of the wheel.

Q. Has the caboose steps at the end and a platform on the end of it, to go up on?

A. It is at the side of the platform.

Q. Steps at the side, and then a platform right at the end for the men to go up on?

A. Yes, sir.

Q. Now, then, this splash board: it runs up from the very
125 end, on the outside of the platform, does it? Or how is it?

A. I will explain that to you. The steps come up from the side; and the splash board is right on the end, right up from the rail, right in front of the wheel, right on each side. They don't have them on now, but they did at that time.

Q. Now, when you go up there on that platform, up the steps of the caboose onto that platform, where is the splashboard?

A. That splashboard is on there to keep the oil and stuff from splashing on the caboose.

Q. If you were to go up these steps on the platform on the end of the caboose, where would the splash board be when you got up there?

A. This is the caboose (indicating by illustration). I go right up these steps. The splash board is on the other side of the caboose.

Q. On the one side would be the caboose where you would go onto it?

A. Yes, sir.

Q. And on the other side would be the splash board?

A. On the one side would be the platform, and on the other side would be the splash board.

Q. And you say the object was to keep the oil from splashing into the caboose?

A. That is what I think it is on there for: to keep
126 the oil and dirt and stuff from splashing up into the caboose.

Q. Where do you say Adam Schlemmer was killed on that shovel-car or caboose? That is, if you saw the place.

A. Do you want me to tell what I think?

By the COURT: What you saw and found and know of your own personal knowledge.

A. My own idea of it is that he was killed——

Mr. GORDON: Not your opinion, but what you saw.

Q. What you saw. After you made the examination after he was killed what you found out.

By the COURT:

Q. Did you make any examination there to find out at what exact point he was killed or how he was killed?

A. I looked at the ends of the cars, yes, sir. I don't know whether this will go in evidence or not, but I will tell you just exactly; and if it does not you may cut it out.

By Mr. TRUITT:

Q. Go ahead.

A. He was killed between the splashboard of the caboose and the body of the steam shovel by coming up.

127 Q. How far was it between the splashboards on the caboose; about how many feet?

A. Between the splashboards.

Q. There were two splash boards on there, one on each side of the patent coupler. Is that right?

A. Yes, sir; there was a splash board on each side.

Q. How far apart were they?

A. About 3½ feet, probably, or four feet, from one splash board to the other.

Q. What kind of couplings were in general and ordinary use at the date this accident occurred?

A. We had automatic couplers, and we had a few link and pin couplers.

Q. In case this shovel car had had an automatic coupler on it like the caboose, would it have been necessary for Adam Schlemmer to have gone in between the cars there to make the coupling?

A. No, I don't think so.

Q. If they had been automatic couplings, just explain to the court and jury how that would have been done.

A. If they had been automatic couplings he could have stood outside and let them come together and they would have coupled themselves.

128 Q. By what? What do you call that?

A. By impact.

Q. You could have stood outside and watched them?

A. Yes, sir.

Q. All that was necessary before they came together was what, for him to do—set what?

A. If they had been automatic couplers all that would have been necessary for him to do was to open the knuckle, to open this knuckle here (illustrating on model) on either car, (It would not matter whether one or both of them was open) and let them come together, and they would make the coupling, without going in between the cars.

Q. If they had been equipped with automatic couplers how was it as to uncoupling them? Would it have been necessary to go in between the cars?

Objected to as immaterial.

A. No, sir, it is not necessary to go in between the cars.

Q. What would you do to uncouple them, if it was not necessary to go in between the cars?

A. They have an operating rod there to couple them without going in between the cars.

Q. And where would he stand to operate that operating rod?

A. At the side of the car.

Q. And when he would apply that operating rod what would it do?

129 A. Raise the pin and pull the cars.

Q. Would it cut the knuckle apart?

By the COURT: I don't think it is necessary to go into that.

Q. If these cars had been equipped with link and pin coupling how far apart would that have kept them?

A. I don't know just exactly how far it would have kept them apart. I cannot tell exactly.

Q. A couple of feet?

A. Oh, it would come 10 or 20 inches apart.

Q. What would have kept them apart with the link and pin coupling?

A. The draw-heads.

Q. Does the link go in the drawheads?

A. Yes, sir.

Q. Just explain to the court and jury how you would couple with the link and pin coupling?

A. This is the draw head here, on one car, and another one of the same kind on another car. (Illustrating on model.) The link is in one draw head and you enter it in this draw-head. There is a

130 hole here and a pin in it. That pin drops down and couples them. This drawhead sticks out from the body of the car 8 or 10 inches, and the other one the same way. Of course this link goes from one draw head to the other one and connects with a link and pin.

By the COURT:

Q. The only way you could get hurt, then, would be to get caught between the drawheads?

A. The only way to get caught then would be to get your arm between the draw heads.

By Mr. TRUITT:

Q. Then as I understand it, the link connects the two draw-heads together by running a pin down through. Is that it?

A. Yes, sir.

Q. Were there any bumpers or dead woods on that link and pin coupling?

A. Some cars—nearly all link and pin couplers had dead woods, what we call dead woods or bumpers, at the side of the draw-head.

Q. About how wide were they on the side of the draw head?

A. They were set on the side of the draw head. I don't know just exactly. A couple of inches or three or four inches from the draw head out on the end sill of the car.

Q. And about how wide?

A. The bumpers?

131 Q. The bumpers.

A. The bumpers were about 8 or 10 inches wide.

Q. Now, you say 8 or 10 inches wide on each side of the draw head. If you kept to the side of the draw head and bumpers on cars equipped with the link and pin coupling could you stand in between the ends of the cars?

A. Yes, sir, many a one I did.

Q. And about how much space had you in there?

A. Oh, I don't know exactly. I had room enough for my body anyway.

Q. Could they not come together?

A. Not when the bumpers were on there, no, sir.

Q. The outside ends would not come together?

A. No, sir.

Q. Did this shovel car and caboose come together?

A. I cannot say that. You would not allow that awhile ago. I cannot say that. I was not there.

Q. Were they equipped with anything to keep them apart?

A. No, sir.

Q. At the time Adam Schlemmer went under there how was it as to being darker under the car than outside?

By Mr. M'CAULEY: He was not there.

Q. From your knowledge of those things.

132 A. It was dark and dusk enough to have our lanterns lit, so it would evidently be darker under a car than it would outside.

Q. Do you know whether Adam Schlemmer had his lantern lit or not?

A. No, I don't know that for sure.

Q. When making that coupling, from your experience did he have to watch that little hole that he was going to put that draw bar in?

A. He certainly did.

Q. How was it as to having to direct his eyes, keep them on that little hole there?

A. Oh, yes, that is what he had to do.

Q. Do you know the size of Adam Schlemmer, about his height, what his height was?

A. I suppose Adam Schlemmer was about 5 feet 7 or 8 inches tall, anyway.

Q. And weighed about how much?

A. Well, he weighed possibly 160 or 165 pounds. I don't know exactly. I am just estimating his weight.

Q. When he attempted to make that coupling do you know how he attempted to make it?

Mr. M'CAULEY: Did you see him?

133 By the COURT:

Q. Did you see how he undertook to make that coupling?

A. I didn't see him try to make the coupling, no, sir.

By Mr. TRUITT:

Q. What do you know about Schlemmer just before he made the

coupling or just while it was going on or anything? Do you know anything about that?

A. The nearest to knowing anything about Schlemmer was when we brought the caboose up the main track and cut it off. I was in the position of head brakeman. I went down and uncoupled the train and brought it down from the siding and stood on the head end of the train.

Q. Did he go with you?

A. I don't know about that. I don't remember.

Q. According to the best of your recollection where did you see him alive?

A. The last I saw him he was on the caboose.

Q. How long was it after that until you saw him dead?

A. Oh, I don't know just exactly how long it was. It was not very long.

Q. Was this caboose coupled on afterwards?

A. Was it coupled on the train after—

Q. After Schlemmer was killed?

134 A. Yes, sir.

Q. How did you do that?

By Mr. M'CAULEY:

Q. Did you see that done?

A. Coupling the car on? No, sir, I didn't see it coupled on afterwards.

By Mr. TRUITT:

Q. Weren't you present?

A. I was on the train, yes, sir, but I didn't see it coupled on.

Q. At this date was there any rule of the company about a stick?

A. Yes, sir.

Q. What was it?

Mr. M'CAULEY:

Q. Was that rule in writing?

Mr. TRUITT: Yes, it is in writing.

By Mr. TRUITT:

Q. What was the rule?

A. Employees making couplings were supposed to use a stick.

Q. (Stick shown witness) What is that?

A. This is a coupling stick.

Q. Is that the kind of a stick you got at that time?

135 A. That looks like one of them, only it was not quite that crooked.

Q. Is that one of them.

A. That is one of them, yes, sir.

Q. Could you have made this draw bar coupling with that stick?

A. I must say no.

Q. What was that stick intended to be used for? On this date that Adam Schlemmer was killed were those sticks given to you then and were you supposed to use them?

A. Yes, sir, they were.

Q. What kind of a coupling were you to use them on?

A. They were supposed to be used in making link and pin couplings.

Q. If you stood in between the outside ends of the cars could you lift up the link with that stick?

A. Yes, sir.

Q. And while you were in between the cars could they come together without your getting injured in making this coupling?

A. Yes, sir; they could come together while you were making this coupling with this stick without getting injured.

Q. What kept the cars from coming in contact with your body?

A. The draw-heads and dead-woods or bumpers.

Q. Were there any dead-woods or bumpers on the caboose?

136 A. At one time they had dead woods—

Q. On this one that Adam Schlemmer was killed at.

A. No, sir, there were none on this caboose.

Q. In your experience how many cars have you found that the ends of them would come together?

A. I cannot answer that. That would be a pretty hard question.

Q. Is it usual for them to come together?

A. Oh, no. You mean the bodies of the cars, do you?

Q. Yes, sir.

A. It is a very unusual thing for the bodies of the cars to come together.

Q. That evening how about this train—how did it go up to the caboose?

A. Very easy.

Q. It went up very gently, did it?

A. Yes, sir.

Q. If this car had been inspected could they have seen this draw-bar coupling on it? We will say, now, a competent inspector had inspected it. Would he have seen this on it?

A. Most assuredly he would have seen it.

Q. He would have seen this draw-bar coupling?

A. Yes, sir.

Q. Any ordinary inspection would have shown it, would it?

137 A. Why certainly. Anybody could see that draw-bar coupling.

Q. How is it as to cars being unequal in height, in your experience, and that high that they will go over the coupling of the other car?

A. That is a very rare thing.

Q. A man going in to make a coupling: would he see that—would he notice that, do you think, that one was much higher than the other?

A. If he would pay particular attention he would see it. And then, again, a man might not see it. They are not supposed to be that way.

Q. You as an experienced man at this business,—would you notice it when you would go in to make a coupling

A. A man might notice it and he might not, Mr. Truitt.

Q. It would be an unusual thing, wouldn't it?

A. It would be what I would consider a very unusual thing, for one car to be higher than another so as to go over the top of another draw-head or part.

Q. How is it as to his noticing if he missed that coupling—if he missed inserting that draw bar in the little hole—that the cars would come together? Would he notice a thing of that kind usually, that the ends of them would come together?

A. I don't think that he would notice it.

Q. Would it be a common occurrence or an uncommon occurrence?

138 A. Very uncommon.

Q. And wouldn't it be much more unlikely that he would notice those things if they were new to him and in the dark of evening?

Objected to as leading, and as incompetent and irrelevant.

By the COURT: Yes, that is leading, and an argument with the witness.

Q. How long had Adam Schlemmer worked on railroads?

A. How long had he worked on the railroad?

Q. Yes, sir.

A. I cannot just exactly tell you that. I knew him about 15 or 16 years before he got killed.

By the COURT:

Q. Had he been working on the road all that time?

A. Yes, sir, to the best of my recollection he had.

By Mr. TRUITT:

Q. Do you know how long he had worked for this defendant company?

A. No, sir, I do not.

139 Q. Do you know where this defendant's lines run from or did on that date, August 5, 1900?

A. By their time tables they run from Buffalo and Rochester

Q. In what state?

A. In New York, state, to the state of Pennsylvania, to Butler.

Q. Was any part of its road in Clearfield County, Du Bois?

A. Yes, sir.

140 Q. Was any part of it on this date in Jefferson County on August 5, 1900?

A. Yes, sir.

Q. Did it run through Clearfield county and Jefferson county?

A. Yes, sir. That is what it was called anyway.

Q. How was it as to Adam Schlemmer being a capable railroad man?

A. I always considered him a very capable man.

Q. As to being a healthy man.

A. Very healthy.

Q. And as to being an industrious man?

A. I always found him that way.

Q. Do you know what wages he got?

A. At that time I do not know.

By Mr. M'CAULEY:

Q. Do you know of your own knowledge what wages he got?

A. No, sir.

140 By Mr. TRUITT:

Q. Did you see this shovel car or any other one after that on this defendant's line?

A. Oh, yes, I have seen quite a number of shovel cars.

Q. What kind of couplings did they have on them?

A. They had automatic.

Objected to.

By the COURT: I don't think that is material. The question is not what they had on other cars, but what did they have on this car.

Q. Did I ask you where this car came from?

A. It came from the North. I don't know just where it came from.

Q. I don't know whether I got what you were doing at the time that train went back to be coupled to the caboose.

A. I was stationed at the head end of that train, giving signals.

Q. And you say it went back gently?

A. Yes, sir.

Q. Did it go on back until it struck the caboose?

A. I cannot say whether it struck the caboose or not, Mr. Truitt. I was too far away from it.

Q. You don't know whether it stopped before it got to
141 the caboose or not?

A. I don't know.

Q. Were you trying to couple it up there?

A. I tried to couple it onto the caboose. That was the idea.

Q. For what purpose?

A. We wanted to get the caboose. We wanted to go to Punxsutawney.

Q. Do you know whether Mr. Schlemmer was ever told how to make this coupling or not?

A. I don't know that at all.

Q. Where did you take the train afterwards?

A. To Punxsutawney.

Q. That same evening?

A. Yes, sir.

Q. That was this shovel-car with the coupling on and this caboose?

A. Yes, sir.

Mr. TRUITT: We offer in evidence this stick identified by the witness.

Mr. M'CAULEY: For what purpose?

142 Mr. TRUITT: At the date this accident occurred, under the evidence the employees were given this stick to make

couplings with. The evidence shows that this coupling could not have been made with this stick. It goes to show that this employee, Adam Schlemmer, who was killed could not perform his duties with the stick they gave him.

Mr. M'CAULEY: I understood this was to make coupling with the link and pin coupling; and there is no proof that there was any link and pin coupling here, or that the stick has any application whatever. And therefore we object to the admission of the stick as incompetent and immaterial and wholly irrelevant in this case.

By the COURT: I cannot see that it is. It was not used in this particular case, and the testimony is that it could not have been used and was not furnished for that purpose. It was furnished to make a link and pin coupling, but this was not that kind of a coupling.

By the COURT:

Q. Was that one of the sticks that were furnished you people?

A. I said we had a stick like that, only it was not that
143 crooked.

By Mr. TRUITT:

Q. What did you say as to that being one of the sticks, crooked or not crooked?

A. If that stick was straight it would be just exactly like our sticks.

Q. Do you know whether the company ever furnished that stick to anybody?

A. I don't know where that stick came from, no.

Mr. TRUITT: I subpoenaed Mr. McCrea, of the defendant company, to bring one of those sticks, and I now ask him for it.

Counsel for the defendant state that they have none of the sticks and object to the stick offered as immaterial.

By the COURT: It does not seem to have any materiality. There is no evidence where this stick came from, that it was ever in the possession of the defendant company, or that it had anything whatever to do with the transaction on trial. And the testimony being
144 expressly to the contrary, that the coupling as made there
could not have been made with this stick, we do not see that it
has any relevancy or materiality to the issue trying; and it
is therefore excluded, and a bill of exceptions sealed to the plaintiff.

Cross-examined by Mr. GORDON:

Q. You knew Mr. Schlemmer to have been in the business of rail-roading for about 15 years?

A. Yes, sir.

Q. Was he perfectly familiar with the coupling of cars?

A. I always thought so.

Q. How much experience had he had in the business of coupling cars? About 10 years was it?

A. Well, I don't know how much experience he had in coupling cars. If he was in the business for 15 years he would have had 15 years' experience.

Q. He was a man of intelligence, was he?

A. Yes, sir.

Q. And perfectly familiar with the business of coupling, Is that right?

A. He was familiar with coupling cars, yes, sir.

Q. This coupling apparatus consisted in the first place, of a single pocket draw head under the shovel, did it?

A. Yes, sir.

145 Q. That single pocket draw head was a draw head which was perfectly familiar to all brakemen, was it not?

Q. With the exceptions of this draw bar.

Q. I am speaking now of the single pocket draw head. That was familiar to all brakemen, was it not?

A. Oh, yes: the single pocket part of it, yes, sir.

Q. Then the draw bar consisted of a straight piece of iron with a hole at either end.

A. Yes, sir.

Q. And all brakemen were familiar with draw bars, were they not?

A. Not that I know of.

Q. Did you never see a draw bar?

A. No, sir.

Q. You never saw a draw bar?

A. I never saw one used on the railroad, no sir.

Q. On an engine?

A. No, sir.

Q. Of course I don't doubt your word.

A. I never used one at all.

Q. The draw bar was fastened to the draw-bar with a pin?

A. Yes, sir.

Q. And it was the simplest form of coupling known, wasn't it?

A. You mean the simplest form of a coupling known?

146 Q. Yes, that it was perfectly simple. There was nothing complicated about it?

A. Oh, no; I don't think there was anything complicated about it, no.

Q. There was not anything that required much instruction, was there?

A. Well, no. A man that never made one of them ought to be instructed about them, I think.

Q. Was it necessary to instruct Mr. Schlemmer—a man of his experience?

A. I don't know that Mr. Schlemmer ever made a coupling like that. I don't know that I said he did. But if that was the first one he ever made he ought to have had a little instructions.

Q. That is, he ought to have been told to keep down?

A. I think so, yes, sir.

Q. That was all that was necessary, wasn't it?

A. Yes, sir.

Q. You don't know whether or not he was told to keep down, do you?

A. I don't know that at all.

Q. In order that the Court and jury may understand how this draw bar was fastened into the single pocket draw head: as I
147 understand, the one end of the draw bar was inserted in the draw head under the steam shovel?

A. Yes, sir.

Q. And the pin put down through the hole in the end of the draw bar?

A. Yes.

Q. That allowed, then, the draw bar to protrude from the draw head and hang down at an angle of 30 degrees, or something of that kind?

A. Possibly 30 degrees anyway.

Q. And all that was required in order to make the coupling was to lift up the free end of the draw bar and insert it in the hole of the coupler on the caboose?

A. Yes, sir.

Q. As to this shovel: wasn't it simply a big machine on wheels?

A. Yes, sir, it was a big machine on wheels. That is what it was.

Q. It was not loaded on a railroad car, was it?

A. No, I do not think so. I think it was a steam shovel, built right on the trucks.

Q. Travelling on its own wheels?

A. I believe so.

Q. Was there any place on that shovel upon which to load merchandise or other articles of traffic?

A. Not that I know of.

Q. It was simply full of machinery—a steam engine and
148 other machinery?

A. Yes, sir.

Q. You speak now, of there being no dead woods upon this caboose, or no bumpers. Is that the case?

A. There were no dead-woods on the caboose.

Q. It was very frequent to omit the dead woods from the caboose, was it not, on railroads?

A. After they applied the patent couplers.

Q. The dead woods were omitted?

A. Off the caboose, yes, sir.

Q. You don't know whether the caboose was shoved up to the shovel car after Mr. Schlemmer was killed or not, do you?

A. I don't remember how they coupled it on after that.

Q. You don't know whether the train was backed up to the caboose or whether the caboose was shoved up to the train after he was killed, do you?

A. I cannot remember that. I have a faint recollection, but I cannot just remember about that part of it.

Q. You know it could be done in that way—by shoving the caboose up to the train, do you not?

A. Oh, yes. If you had power enough you could do that.

Q. That is, you could do that by hand in case you desired, could you?

149 A. You could do that, ues, sir; but it is not customary to do that, you know.

Q. And then a man would sit right down under the shovel and lift the draw bar up without danger, couldn't he?

A. He could if he would get his head down.

Q. Simply sit still under the shovel and push the bar up, could he?

A. You mean for them to shove the caboose up?

Q. Yes, sir.

A. By hand?

Q. Yes, sir.

A. I cannot understand why that would be any safer than backing the train up.

Q. You cannot understand that?

A. A man could be caught one way just the same as the other.

Q. Could not you do it that way, though?

A. O, yes, you could do it.

Q. And not go with the train at all; simply stay under the train or under the shovel and let them push the caboose up to you. Couldn't that be done?

A. Yes, sir. You can do most anything like that.

Q. That was well known to all brakemen, wasn't it?

A. No, sir.

Q. That was not well known to all brakemen?

A. It is not very often that I ever saw them shoving cars
150 around by hand.

Q. You never saw them shoving cars around by hand?

A. Not very often.

Q. Do you mean to say that you never have seen that done?

A. Oh, yes, I have seen it done.

Q. And you have seen that done a number of times, haven't you?

A. Oh, I don't know about a number of times. Of course I have seen it done, but I don't know how many times.

Q. Then it is not an unknown thing among brakemen at all, is it?

A. Oh, no. We have often shoved a caboose up like that, but we never shove cars around by hand. That is pretty nearly impossible.

Q. But you often have shoved cabooses around, haven't you?

A. Oh, yes. The truth of the matter is we have, yes, sir.

Q. That is done, then, frequently—the shoving of a caboose up by hand, is it not?

A. Yes, sir.

Q. And well known to all brakemen, wasn't it?

A. I don't know about that—by brakemen.

Q. How far away from the caboose were you when Schlemmer was killed?

A. About 15 car lengths, I suppose, as nearly as I can recall.

Q. That would be about 400 feet, or 500, would it?

151 A. Well, the length of 15 cars would be about 400 feet.

Q. It was not quite dark yet, was it?

A. Just dusk.

Q. Just getting dusk?

A. Just getting dusk, so that it was necessary to have lights lit.

Q. You had just lighted your lamps, as I understand it.

A. Yes, sir.

Q. It was not quite nine o'clock, was it?

A. I believe that happened about 8:55.

Q. Did you look at your own watch so as to ascertain exactly?

A. I don't remember that.

Court adjourned until 9 o'clock tomorrow morning.

TUESDAY, January 28, 1908.—Morning Session, 9 o'clock a. m.

Mr. DORSEY E. GENSAMER recalled.

Redirect examination by Mr. TRUITT:

Q. In your cross examination you stated that you often helped to shove cabooses around by hand. Did you ever do that to make coupling?

152 A. No, sir, we didn't do that very often. Of course it has been done.

Q. Have you done it to make couplings?

A. No, I don't think we ever did that to make couplings, purposely.

Q. As to this shovel car: did it have sides in it?

A. Sides on the shovel car?

Q. Yes, sir.

A. Yes, sir, it had sides.

Q. Ends?

A. Yes, sir, ends.

Q. Did it have a roof on it?

A. Yes, sir.

Q. Did it have a door in it?

A. Yes, sir, it had doors in it.

Q. Windows in it.

A. I don't know as to its having windows in it at all.

Q. What did it look like?

A. The one end of it was just similar to a box car.

Q. Was that the end that was next to the caboose?

A. Yes, sir.

Q. If we show that that shovel car overlapped the draw bar couplings when they went together and that the ends would go together from your 20 years (I think you say you have had) of experience in railroading and the coupling of cars, taking it in the dusk of the evening, a flagman, as you know, of Mr. Schlemmer's experience, for the first time if this shovel car and draw-bar coupling came at him that way, would a reasonably observant flagman notice that the bottom of the shovel car was higher than the bottom of the caboose?

153

Objected to.

Mr. TRUITT: I don't want to recall the witness. And if we don't show that that was higher we will ask that his testimony be ruled out.

Mr. M'CAULEY: You had better recall him.

By the COURT: Is that a matter of expert testimony? I do not think that is a question of experience. It is a mere matter of observation. You have the facts. Isn't that a matter for the jury, a matter of common sense and every day experience?

Q. Having this coupling to make in the dusk of the evening, should he have noticed that there were no bumpers on the shovel car or caboose?

154 Objected to as incompetent.

By the COURT: I think that is the same question. How can he tell what he would have noticed? He may have noticed it and he may not have.

Mr. TRUITT: The law would ask, what would a man of reasonably ordinary experience notice.

By the COURT: That is a matter for the jury. This is a matter that any ordinary, common man would know pretty nearly as much about as an expert; and it would be pure guess work on his part whether he saw it or did not see it.

Q. If this was the first time that Mr. Schlemmer undertook to couple a coupling like this draw bar coupling, in the dusk of the evening, and the shovel car overlapped the draw-bar coupling: what would you say as to whether he should have been told that or not, from your experience?

Mr. M'CAULEY: Objected to, because the facts have already been stated, and this would be simply giving the opinion of the witness.

The jury can tell that as well as Mr. Gensamer.

155 By the COURT: I think he may state if there was anything there that an employee or an experienced man should have been instructed in. I understood him to give that yesterday, that the only instruction he needed was to keep down below the bottom of the shovel car.

Q. (Question read.)

A. I don't know that I said that it overlapped.

Q. What would you say now, if you had been told that it overlapped?

A. Well, if it did overlap, (which I do not know), he should have been instructed.

Q. What instructions ought he to have had?

A. He ought to have been instructed to keep down.

Q. And what else?

A. I don't understand.

Q. What other instructions ought he to have had outside of that if any?

A. What other instructions ought he to have had besides keeping down?

Q. Yes.

Mr. M'CAULEY: He has already testified that those were the instructions he needed, in his former examination.

156 Q. Should he have been told that the car overlapped, if it did?

Objected to as leading.

By the COURT: I don't think you can lead your witness in that way. If there are any particular instructions that he should have had under the conditions that existed there, let the witness state.

Q. Go ahead and tell us whether there were any other instructions he should have been told besides keeping his head down: whether he should have been told why to keep his head down.

A. I cannot tell you that. I don't know whether there were any more or not.

Q. If the cars did not have (I believe you testified to that) bumpers on them to keep them from coming together should he have been instructed about that?

Objected to as leading.

By the COURT: Yes, I think that is leading. I think the witness should be asked what instructions. He can describe the conditions, and then he can tell that. I don't think the counsel can
157 suggest piecemeal to him. And then, the man is bound to exercise ordinary care. He possibly could have seen some of those things himself if he had been looking.

Q. Did you testify whether you noticed or made an examination before or after this accident as to whether the shovel car or caboose had bumpers on or dead woods?

By the COURT: You went all over that yesterday.

Mr. TRUITT: And he said they did not have?

By the COURT: Yes, a dozen times, if he said it once.

Q. What would you say as to any instructions before Mr. Schlemmer undertook this coupling as to the absence of bumpers?

A. I don't know whether he was instructed or anything.

Q. Well, should he have been? From your experience what would you say?

Objected to as repetition.

By the COURT: Let him answer, if he knows, taking 15 or 16
158 years' experience in railroading, going in there to make a coupling that seemed to have been a different coupling from what he had been accustomed to make, what he would have been required to do himself and what instructions he would require.

Q. (Question read.)

A. Well, it was an unusual coupling. The man should have been told how to make the coupling.

Q. And as to the absence of those bumpers. What would you say about that?

Mr. GORDON: The witness has testified on cross examination that cabooses did not usually have bumpers.

Mr. TRUITT: And the reason of that is that since they got automatic couplers they did not need them.

Q. What would you say as to that—as to the absence of bumpers: whether he should have been told about that?

A. I don't know whether he would understand bumpers not being on there or not in this case.

Q. Suppose he did not—then should he have been told about it?

Objected to as hypothetical.

159 By the COURT: I don't think you can argue that way with the witness. I think the proper thing is to inquire, if he was to make an unusual coupling there what instructions he required in order to make it and what instructions were necessary there to make that particular coupling in safety taking all the things into consideration.

Recross-examination by Mr. GORDON:

Q. I show you your cross examination on the last trial of this case, on the bottom of the page. (Paper book shown witness) Did I not ask you on the former trial of this case, on cross examination, "That is the simplest form of coupling known, isn't it?" and didn't you answer, "The simplest in that case"?

A. Yes, sir, I believe so.

Q. That is true, that it was the simplest form of coupling.

A. Yes, sir, it was the simplest form of coupling in this case.

Q. And I further asked you, "All that was necessary in order to couple to the automatic coupler on the caboose was to lift up the end of the draw bar and insert it into the slot in the end of the automatic coupler"?

A. Yes, sir.

Q. You replied, "Yes, sir." That is true, is it.

160 A. Yes, sir.

Q. Did I not further ask you, "Any brakeman would understand how to do that, wouldn't he, Mr. Gensamer?" and did you not reply, "Any man would understand it, yes sir"?

A. Well, yes; any man would understand that he had to raise this draw bar up and insert it in the slot in the automatic coupler.

Q. Then didn't I ask you, "It didn't require any instructions to tell him how to do it?" and didn't you answer, "No, I don't think he needed any instructions whatever."

A. He understood that this draw bar—

Q. But didn't you so testify before? Look at the book and refresh your recollection.

A. That is what I said here.

Q. Is it true?

A. All any brakeman would need to do and to know would be to insert this draw bar into the slot, yes, sir. That was true all right.

Q. Did Mr. Schlemmer need any instructions whatever to make that coupling?

A. He knew that the draw bar had to be inserted into the slot.

Q. Well, did he need any instructions as to how to do it?

A. I don't think he did as to that part of it.

161 Q. Then, didn't I further ask you, "The only thing, then, in order to avoid accident, was to keep down when you raised the draw bar—keep your head down?" and didn't you answer, "Yes, sir, he had to get down under"?

A. Yes, sir, I answered that.

Q. And then, didn't I ask you, "And if you kept your head down there was no danger of injury, was there?" and did you not reply, "If you kept your head down and made the coupling there was no danger."

A. Yes, sir.

Q. That was true, wasn't it?

A. That was true, yes, sir. If you kept your head down there was no danger.

Q. There was plenty of daylight to enable one to see that this was a steam shovel, was there not?

A. Oh, yes, you could tell that all right.

Q. Plenty of daylight to enable one to observe that that caboose had no bumpers on?

A. Oh, yes, if he took particular notice.

Q. And it was not usual for cabooses to have bumpers, was it?

A. Not at that time.

Q. Didn't you further testify, "Q. And draw bars were often used, too, formerly, were they not?" and didn't you answer, "Well, it was very frequently they were used"?

A. Well, they were frequently used.

Q. They were frequently used, weren't they?

A. Yes, they were frequently used, but I never used any.

162 Q. But weren't they frequently used? Don't you know that?

A. Well, they were frequently used, yes, sir.

Redirect examination by Mr. TRUITT:

Q. Was the draw bar coupling like was on that shovel car in frequent use?

A. I never used one like that.

Q. Did you ever see one like that, with that single pocket draw head and a draw bar hanging down: did you ever see one like that used?

A. No, sir, I never did.

Q. When you were talking about draw bars being in frequent use you meant the kind that they use on the engine, didn't you?

A. They had draw bars made in an "S" shape. They were used on engines where the engine was lower than the car. They have used them to couple on.

Q. And that is what you mean by draw bars in frequent use, is it?

A. That is the only draw bar that I ever had any experience with, just a small "S" shaped draw bar.

Q. Were draw bars such as this used for car couplings at all?

A. I never experienced any in my work.

Q. Did you ever see any?

A. I never did like this.

163 Q. You say it was not usual for cabooses to have bumpers on. When did they quit putting bumpers on cabooses?

A. I am unable to say that.

Q. Wasn't it after they got to putting automatic couplers on?

Objected to as leading.

By the COURT: I think you are simply travelling over ground you went over yesterday, and on that precise point. The witness testified that they took them off after they had put on automatic couplers.

Q. You testified that if you made the coupling there was no danger. How was it if you did not make it?

A. With the draw bar?

Q. Yes, sir, this coupling to the automatic coupling. Was there any danger then?

A. Yes, sir, of course there was danger.

Q. Isn't that what killed Adam Schlemmer?

Mr. GORDON: Objected to as the witness says he was 400 feet away at the time of the accident.

By the COURT: Yes, that would be a mere guess on the part of the witness.

164 Q. They have had you testify that this was the simplest form of coupling in that case. What do you mean by its being so simple? Just explain that.

A. I mean that it was not complicated. It was simply a straight draw bar. There was nothing complicated about it.

Q. The draw bar and the hole were simple, were they?

A. Oh, yes, that part of it.

Q. When it came to getting down between the tracks and holding it up and putting it in between the slot, and the train moving: what would you say about that?

Objected to as repetition.

By the COURT: Let him answer.

A. I would consider that dangerous.

Q. And when you say, "I don't think he needed any instructions" does that include if the shovel car went over the draw bar that he did not need to be told about that? Didn't he need to be told about that?

Objected to as leading.

By the COURT: The objection is sustained.

165 Q. Do you mean to testify now that all that Adam Schlemmer needed to know was to insert that draw-bar in the slot—just that one thing: was that all he needed to know to make that coupling?

Objected to as leading.

Q. You had him testify on cross examination that all he needed to know was to insert the draw bar in the slot. What do you mean by that Mr. Gensamer?

Q. I mean when he raised that draw bar up that that was what he was supposed to do, enter it into the slot, into the coupler on the caboose.

Recross-examination by Mr. GORDON:

Q. The only difference between this draw bar and the ordinary draw bar on an engine was that this was a little longer and heavier, and straight: was that all the difference?

A. Yes, sir, that is all the difference. It was a great deal longer.

Q. The draw head on the steam shovel was the same as a draw head on an engine, was it not, at that time?

A. The draw head on the seam shovel?

Q. Yes, sir.

A. Was the same as it was on an engine at that time?

Q. Yes, sir.

A. I am unable to say that just exactly.

Q. Well, simply a common, every day single pocket draw head, was it not?

A. It was a draw-head.

166 Examination by the COURT:

Q. You examined the cars and the coupling there after this accident, did you?

A. No, I don't think I ever made any examination.

Q. Did you ever examine that coupling—what kind of a coupling it was?

A. Other than just to know that it was a draw bar coupling. That is all.

Q. Did you know the condition of the cars, the caboose and the shovel car, when the coupling was made at the end?

A. I knew the condition of the caboose, but I never made any close examination of the car, no, sir.

Q. From all the knowledge you had of the coupling, and of the ends of the car, and of the construction of the cars and of the coupling, what difficulty, if any, was there in making that coupling?

A. The difficulty—all that we can observe from the matter—was that drawbar from the steam shovel of the caboose,—a long draw bar.

Q. Did that make it difficult?

A. Difficult to the extent that it was a heavy draw bar.

167 Q. What was required on the part of the brakeman to make that coupling with safety?

A. He would have to raise this coupling up and enter it into the slot of the draw head on the caboose. He would have to keep his head down.

Q. Was there any occasion for him or any necessity for him to put his head up in between there in order to make the coupling?

A. You know, as I do, that it was a very heavy coupling, a very heavy draw bar; and to raise it up to insert it into this slot required strength.

Mr. ISAAC HOOVER, called as a witness by the plaintiff, sworn:

Examined by Mr. TRUITT:

Q. On the evening of August 5, 1900 when this accident took place where did you live?

A. Brady street, Du Bois.

Q. Had you ever railroaded any before that?

A. Yes, sir.

Q. How long?

A. Oh, about 2½ years, I believe, if I recollect right.

Q. Where?

168 A. On the B. R. & P.

Q. For the defendant in this case, the B. R. & P.?

A. Yes, sir.

Q. Have you railroaded any since?

A. Yes, sir.

Q. How much?

A. I believe over there years since that.

Q. You say you were living at Brady street, in Du Bois?

A. Yes, sir.

Q. Did the defendant's line at that date, August 5, 1900 cross Brady street?

A. The B. R. & P. does, yes, sir, just at the edge of the borough.

Q. It ran across Brady street?

A. Yes, sir.

Q. On this particular evening did you see this shovel car?

A. I did.

Q. When did you first see it?

A. That evening. They pulled the train up by the house. The house is right along the bank, probably 50 or 60 feet from the track—I won't say for sure which, for I didn't measure.

Q. And it went up past you, like, did it?

A. They pulled it out from the switch and then backed down on the caboose.

Q. When it backed down did it pass you?

169 A. Just a little.

Q. What were they backing it to?

A. To the caboose.

Q. Where was the caboose?

A. Just set to clear the crossing.

Q. Was it on the main track?

A. Yes, sir.

Q. Standing still?

A. Yes, sir. The Caboose was, yes, sir.

Q. And the first thing you saw was the shovel car going up towards the caboose.

A. When they pulled it by. They went up the switch and pulled it by, and backed up to the caboose.

Q. You saw it when they took it from the switch to get it into the main track, and then when they came up?

A. Yes, sir.

Q. What called your attention to this shovel car, if anything, when it went up there?

A. It was a very rare thing. You don't see very many of them. I do not, I know.

Q. Was there anything else about it that you noticed?

A. Well, it was machine built on top of the car, like. It would attract attention, I believe. And the draw bar.

170 Q. Did you notice the draw bar coupling?

A. I did at the time, yes, sir.

Q. And did you notice the coupling of it: when they went to make the coupling did you notice it?

A. I did, yes, sir.

Q. What made you notice that?

A. Simply because it was an unusual thing. I never noticed any—hardly ever—none before, to my knowledge. I made the remark to Cochran, "We will see if he makes the coupling". I believe that is the remark I made to him.

Q. You were sitting where?

A. On the porch at home. At my mother's place, on the porch.

Q. And who was with you?

A. James Cochran.

Q. And you said what to him?

A. I said, "We will see if he makes the coupling". I would not say for certain that that is just the remark I made, but I believe it is.

Q. Did you watch him?

A. I did, yes, sir.

Q. Which end of the train was the caboose on when they went to make the coupling—the North, south, east or west end?

A. The north end. I would not say for sure which way
171 that yard is.

Q. Was it up towards Falls Creek?

A. Yes, sir, towards Falls Creek, to go to Punxsutawney.

Q. That would be the North end, wouldn't it?

A. Yes, sir.

Q. Which side of the track were you on?

A. I was on the opposite side.

Q. The west or the east side?

By the COURT:

Q. The Du Bois side or the other side?

A. It was right in Du Bois. I lived in the Fourth Ward.

By Mr. TRUITT:

Q. Were you on the right hand side, facing north, or the left hand side?

A. On the right hand side, facing north.

Q. Were you on the side next to Brookville or next to Du Bois?

A. No, next to the other side.

Q. Then you were on the east side. How far away were you when the caboose and the shovel car came together there: how many feet?

A. Probably 50 or 60. As a rule they have 40, and the house stands at the end of the bank.

Q. How far away were you?

172 A. 50 or 60 feet, I would say. I would not say for sure.

Q. What time of day was it?

A. It was just getting dusk. I would not say for certain the time, for I didn't notice. Some of them lit their lanterns. I would not say all of them did, for sure.

Q. Did you see the lanterns in the crew?

A. Yes, sir.

Q. Did you notice Schlemmer?

A. Yes, sir.

Q. Had he his lantern?

A. He did.

Q. Did you know Adam Schlemmer?

A. I knew him. I was not personally acquainted with him, but I had met him different times.

Q. You knew him before that evening—who he was?

A. I did, yes, sir.

Q. Which side did he go in to make this coupling?

A. He went in on the opposite side from where I was sitting.

Q. That would be from the west side?

A. Yes, sir, from the west side.

Q. Did he come towards you?

A. Yes, sir, he had to to make the coupling.

Q. With his face towards you?

A. Yes, sir.

173 Q. What was the first thing you saw him do to make this coupling?

A. Of course he went in there; and of course he had the end of the draw bar to make the coupling.

Q. Which side of Schlemmer was the draw bar coupling on: was the draw bar coupling on his right hand side—the shovel car—or on his left hand side?

A. The caboose stood there. With a link and pin coupling, of course that is different.

Q. The way you are motioning there the shovel car was on his right hand side.

A. Yes, sir, on his right hand side.

Q. Just show the court and jury what you saw him do?

A. All I know about it, he had to get down to make this coupling, to keep down to enter this draw bar to make the coupling to keep down from the shovel or caboose.

Q. Did you see him get down?

A. I certainly did, yes, sir.

Q. Whereabouts as to the tracks: where did he get down?

A. Right between the rails. He had to be.

Q. Did you see him catch hold of this draw bar?

A. I did, yes, sir.

Q. What was he doing with it?

A. He was trying to enter it into the coupling like, this slot, like, where the pin dropped through, to make the coupling.

174 Q. Did you see him try to do that?

A. I did, yes, sir.

Q. And saw him go in there?

A. He certainly went in there, yes, sir.

Q. Then what happened?

A. When they came together of course I did not see for a minute: but I saw the light drop, and I said somebody was caught. And Jim ran down around this middle brakeman, as they call him, and he got around and got ahead of me; and he just pulled him out of the rail or just had hold of him when I got there.

Q. Did you see him under the rail when he caught hold of him?

A. I saw him under the rail when he was making the coupling.

Q. What happened to him, Mr. Hoover?

A. His head was caught, above the ears, if I remember.

Q. About how much of it was caught?

A. I would not say for certain. Just the top of his head was caught, like. I didn't look particularly, for I didn't like to see it, anyhow.

Q. Did you notice where his head was caught on that car and on that caboose?

A. You mean on the caboose and on the steam shovel?

Q. Yes, sir.

A. It was just about the top of the caboose, as near as I can tell.

175 Q. What part of it? Take those boards that run up—that was at what boards?

A. Some call them splash boards. I hear different names for them. I suppose that is what caught him. I didn't examine the caboose particularly, no, sir.

Q. After the top of his head was crushed what became of him?

A. I helped to put him in the caboose, and we took him down to the Y. M. C. A.

Q. Do you know whether it killed him or not?

A. It certainly did.

Q. Did you see him after he was dead?

A. Yes, sir. I helped to carry him off the caboose into the Y. M. C. A. He was dead then.

Q. I am going to draw two lines here in front of the jury with a piece of chalk to represent those two tracks. I want you to come down here and show the jury how he squatted down, if these were the tracks that that was on. What was on the left, on the north?

A. The train was coming back.

Q. That was the caboose on your left hand, wasn't it?

A. Not standing this way, no, sir.

(Witness faces about.)

Q. As you are standing there in front of the jury, and two parallel lines in front of the jury, I want you to show the jury which side the caboose was on.

176 A. It was like this (indicating).

Q. On the left side?

A. And I was sitting over there on the porch.

By the COURT: You have it wrong now.

(WITNESS:) This was backing down from Punxsutawney to Du-Bois.

By the COURT: That end is the Punxsutawney end and this is the Falls Creek end.

By Mr. TRUITT:

Q. Cannot you do it from the other side?

A. Yes, I can certainly.

(Witness faces about.)

Q. Now, with those parallel lines in front of the jury and you facing the jury, we will say that your left hand is north. What was on the north of Schlemmer?

A. That would be the caboose.

Q. And what was on the right hand side, or south?

A. The steam shovel.

177 Q. Now then, as that steam shovel came up there, I want you to take the position that you saw Schlemmer do in making this coupling.

A. It was like that. (Illustrating.) He had hold of the caboose and was like that.

Q. He squatted down?

A. He had to.

Q. And with his left hand what had he hold of?

A. I suppose he had hold of the caboose. Yes, sir, he had.

Q. And what had he in his right hand?

A. This draw bar. He reached with this drawbar to couple this car.

Q. And if those were the tracks get in where he was.

A. He would have to get pretty nearly the center.

Q. Where was he where you saw him?

A. Right between the rails, right where I am now. (Illustrating.)

Q. When did he drop—before or after they came together?

A. After. Just an instant.

Q. And where did he drop?

A. He dropped right across that rail.

Q. Where did his lantern drop?

A. Right in the track. In the middle of the rail. I didn't measure or notice particularly.

Q. Did you make an examination of that shovel car and that caboose before or after this accident—did you look at them?

178 A. No, I did not; no, sir.

Q. What do you know about them having bumpers on?

A. Which?

Q. The shovel car or the caboose?

A. I never saw any bumpers on a caboose. In all my experience on the B. R. & P. I never saw any bumpers on a caboose.

Q. On that shovel car: had it any on?

A. I don't believe it had. The shovel extended out over the car.

Q. Did you notice whether the bottom of the shovel car was higher or lower than the coupling on the caboose?

A. I do not understand.

Q. Did you notice whether the end—the bottom of the shovel car—was higher or lower than the automatic coupling on the caboose?

A. It was higher. The shovel extended out over the car, yes, sir.

Q. Would the end of it strike the automatic coupling or go over it?

A. Go over the top of it.

Q. Did it go over it?

A. Yes, sir, it certainly did.

Q. And how as to the end of the shovel car going against the end of the caboose: did they go smack together?

A. They certainly did. They went right like two boards would go together, flat sided. That was all there was.

179 Q. If the shovel car had had an automatic coupler on it like the caboose would they have gone together?

Objected to as immaterial.

By the COURT: Mr. Truitt, will you pretend to say or will you argue to this jury that he did not know whether there was an automatic coupler on there?

Mr. TRUITT: I intend to argue this jury, and it is the law, too, that when a thing is suddenly thrust on a man and he has got to do it we cannot tell what all he did see or what he didn't see.

By the COURT: You proved most explicitly here—unless you deny that that is true—that in making the couplings with automatic couplers it was not necessary to go in there; and if he went in there with an automatic coupler he was clearly guilty of negligence.

Q. Did you in all your experience ever see the ends of the two cars go together before?

A. Not without they were broken down, or something like that.

Objected to as immaterial.

180 By the COURT: The objection is sustained, the testimony excluded, and a bill of exceptions sealed to the defendant. It is not a question of what he has seen on other cars. It is a question of what the condition of these cars was.

Q. Do automatic couplings keep cars apart?

Objected to as immaterial.

By the COURT: Let the witness answer that. Any man that had common sense could answer that from what has been testified to here, from the facts. We will admit the testimony, overrule the objection, and a bill of exceptions is sealed to the defendant.

A. (Witness:) It does.

(Question withdrawn.)

Q. Just describe automatic couplings to the jury.

A. Describe them.

Q. Yes, sir, taking that model.

A. That is an automatic coupling there: this is what I understand is automatic, yes, sir, put on the end of cars; and the two of them couple themselves.

(Question read.)

A. This is an automatic coupling.

181 Q. I have shown you a model there. What is that a model of?

A. This is a model of what they call a patent coupling, an automatic.

Q. How as to being the same that was on that shovel car that evening?

A. That was not an automatic. That was a solid draw head.

Q. I mean on the caboose.

A. That was the same thing as this.

Q. This is a model of it, is it?

A. I believe so.

Q. That little slot there?

A. That is where you enter the pin. When that draw bar came in there that is where you would have to enter the pin.

Q. In the jaw there, that little slot: does that represent where that had to go—that little draw bar?

A. Yes, sir, it is.

Q. About what was the size of that little slot in the automatic coupling?

A. That is on the car you mean?

Q. No, on that caboose, that evening: what was the size of that slot or hole?

Mr. M'CAULEY: Objected to, because the witness has already stated that he did not examine that car at that time, as I understand it, from his previous testimony. Now, how can he describe a coupling that he did not know or did not see?

Q. Did you notice that hole in that coupling at that time or at any other time?

A. I noticed it different times on cabooses and on cars, the same as on a car.

By Mr. M'CAULEY:

Q. Did you notice particularly that coupling that night?

A. The same as the rest of them.

Q. Did you examine that particular coupling that night?

A. No, I did not.

By Mr. TRUITT:

Q. How is it as to being the same as all other automatic couplings of the same kind?

A. It looked to me the same.

Q. Have you examined the others?

A. Not particularly. But I have worked about them.

A. I would not say, for I never measured it. I would judge probably two inches and a half or three inches high.

Q. The free end of that draw bar: what was the size of it?

A. That would be in the neighborhood of an inch and a half or two inches, I suppose. I would not say for certain, for I didn't measure.

Q. How was it as to that being a difficult coupling to make that evening?

A. It certainly was, just as sure as the world. Anybody knows that that knows anything at all.

Q. What was difficult about it?

A. Simply because the draw bar had to connect into this coupling

there. The pin had to drop at the same time it went there with the hole in it, or if it did not it would not make. That was all there was about it.

Q. What was necessary to couple that big draw bar into that little slot in that automatic coupling that evening?

A. What was necessary?

Q. Yes, sir.

A. You certainly had to raise it up to get it into that place there for the pin to drop through the hole in the end of the draw bar.

Q. How was it as to watching where he was inserting it: had he to look where he was inserting it?

A. He certainly did. He had to see where—

Q. Had he to watch the little hole where he was putting it, I mean, to make this coupling?

184 A. He would not see the pin at all. He could enter it into this hole, but he could not see the pin part of it.

Q. Was it necessary or not necessary to watch where he was putting that pin?

A. He had to watch that part of it, and he had to watch this part of it.

Q. He had to watch that, did he?

A. He could not do it if he had his eyes shut. That is sure as the world.

Q. Had he to pay any attention to the moving train?

A. He certainly would, yes, sir.

Q. Would he notice the result of missing that coupling, just going in there suddenly?

A. If he would have known it I don't believe he would have gone in there at all.

By the COURT:

Q. Know what?

A. The result of missing the coupling.

Q. Explain what you mean by that?

A. A man had either to keep down or get smashed, one of the two—to keep under the cars or get smashed if he missed it.

By Mr. TRUITT:

Q. He did try to keep down, didn't he?

185 A. He certainly did, yes, sir. He would have caught his body if he would not have.

A. It would have caught what part of his body?

A. Below his head.

Q. Was there any danger there by reason of the shovel car overlapping the draw bar?

A. I don't understand that quite.

Q. Was there any danger, more than ordinary—I will put it—by reason of the shovel car overlapping the automatic coupling on the caboose?

A. There certainly was danger there, yes, sir.

Q. Was there more than ordinary danger on that account?

A. I never saw another shovel before this one; but it was more than any other car. That was sure as the world.

Q. Was there any more than ordinary danger there, now, by reason of the fact that the shovel car overlapped the automatic coupling? Did that make more than the usual danger?

A. Yes, sir, it did.

Q. Why?

A. Because there was no protection there for a man. It would come square together.

Q. Was there any more than the ordinary danger by reason of their being no buffers or dead woods on either one of them?

A. I don't know. This thing was about the height of a car. It was built on top of a car.

186 Q. Suppose they had been of the same height?

A. I don't believe it could have caught him then. I would not say that, for this thing was above.

Q. Where his head was caught there on the outside there, would it have been caught—would they have come together and caught it—if there had been dead woods or bumpers on there?

A. Not if they had been long enough.

Q. From your experience was it necessary for him to get in between those rails to make that coupling?

A. He had to. He could not make it outside.

Q. How is that?

A. He could not make it without getting in there.

Q. Was this draw bar coupling to couple to an automatic coupling the kind that was ordinarily in use, in general use, on that day?

A. You mean, was it used right along?

Q. Yes, sir.

A. Not that I ever saw.

Q. What kind of coupling was in use on that date, generally and ordinarily?

A. The automatic was at the time, like this one here. (Indicating model.) They are pretty nearly all alike. There are differences in them, but they answer the same purpose.

187 Q. Where they use automatic couplings is it necessary for men to go in between the cars?

A. No, sir, it is not.

Q. How do they operate?

A. Just like that (indicating). You couple them and they open themselves.

Q. Explain how you operate automatic couplings like was on the caboose that evening, the kind that was in general use, to make and unmake them.

A. If they are closed you have to open them.

Q. Where do you stand to open them?

A. You can go right in front of them, if you have a mind to, or you can go to the side of them. There are a lot of them that open with a lever.

Q. Can you stand outside and open that lever?

A. Yes, sir.

Q. And will that throw the jaws open?

A. Yes, sir, it will if there is nothing wrong with them—if they are not out of whack.

Q. Is that what you call getting ready to make coupling?

A. Yes, sir, you have to open it up.

Q. As I understand you can go in there and pull it apart with your hands before they come together. Is that it?

188 A. You mean if they do not pull open with the lever you can reach in and pull it open? As a rule they will work themselves, if there is nothing the matter with them, if they are not broken.

Q. When you went to uncouple them where did you stand?

A. At the side.

Q. And worked a lever?

A. Yes, sir.

Q. And does that throw the jaws apart?

A. You raise a lever here, and that will certainly cut the cars.

Q. Are you required to go inside to uncouple them?

A. Not at all.

Q. Did you notice what kind of trucks were under that shovel car?

A. I didn't pay no particular attention. They looked like ordinary couplers.

Q. Do automatic couplers couple by impact—just when they come together?

A. They certainly do, yes, sir.

Q. This shovel car that day; had it ends on it and sides and a roof?

A. Yes, sir, it had.

Q. What did it look like?

A. I don't know. Just like a shack built on top of a car, or something like that.

189 Q. Have I asked you whether that draw bar coupling was a usual or an unusual coupling?

A. How is that?

Q. The draw bar coupling: was it a usual or an unusual coupling?

A. It was unusual, I would say.

Q. And how was it as to being a new thing: do you know whether Mr. Schlemmer ever saw one before?

A. I could not say that. I don't know.

Q. Do you know whether he was ever told how to operate it?

A. I do not, no, sir.

Q. Do you know how they made the coupling afterwards?

A. I do not, no, sir.

Q. If the company had had a competent inspector to inspect this shovel car, on an ordinary and reasonable inspection could he have seen that coupling on there?

Mr. McCauley: Objected to. The witness has not qualified as an expert as to an inspector's duty.

By the COURT: I don't think he is competent to answer the question. Besides, the question is whether anybody could see it there.

190 Q. If a man made an inspection of that car would he have seen the draw bar coupling?

Objected to.

By the COURT: I don't know why that should be objected to, on your side, especially. This man undoubtedly saw it. He went in there and undertook to make the coupling with it.

Q. At this date do you know whether they furnished their employees a stick to couple with?

A. I don't know at all. I would not say.

Q. I mean whether the defendant company furnished the employees a stick to make the couplings with.

A. The only year I was out they did. At this time I would not say.

Q. How many days or months before this time did you quit?

A. Three years, or something like that. I got let out. I didn't quit.

Q. How did they back that train back there?

A. How did they back it back there?

Q. Yes, sir. Was it going rapidly or gently?

A. No, sir: I never saw a train come back any easier and nicer than that train came back. I must say that.

191 Cross-examined by Mr. GORDON:

Q. How far away were you from the steam shovel at the time the coupling was made?

A. 50 or 60 feet, or something like that, sitting on the porch.

Q. Was there still plenty of daylight left to enable you to see what was happening?

A. Plenty of it. It was light enough that I could see that distance. They had light there to see a signal, to make it certain, they could probably have seen, but they made it certain. Their lanterns were lit at the time.

Q. Could you see the coupler from where you stood?

A. I certainly could.

Q. There was plenty of light to enable you to see that?

A. There certainly was.

Q. You could see that it was a steam shovel?

A. I certainly did, yes, sir.

Q. And an unusual apparatus to see on a railroad.

A. Yes, sir.

Q. You could see the dangers at a glance, couldn't you?

A. I didn't exactly notice the danger, or anything like that.

Q. What?

A. I didn't exactly notice the danger, or anything like that. I never thought of any danger. If I had knew there was any-

192 body going to get killed I would have tried to avoid it; but I didn't know that, you know.

Q. I asked you upon the last trial this question: "You could see at a glance how to use it—that is, the coupling—and what the dangers are?"; and your answer was, "Oh, yes, certainly"?

A. Certainly what? How is that?

Q. Didn't you say that? (Paper book shown witness.)

A. You can see it at a glance. Of course, undoubtedly anybody knows it was an unusual thing to see.

Mr. CORBET: They are asking the witness what his former testimony was. We object to that as incompetent and improper.

By the COURT: I think they may ask him if he could not see these things; and then if he says not they may ask him if he did not so swear on the former trial.

(Testimony read.)

By the COURT: You may ask him if he did not testify on the last trial that he could see the dangers at a glance.

Q. Didn't you so testify to that?

A. Probably I did. But at a glance a man would not think about it. There was danger there, as sure as the world, or the man
193 would not have got killed.

Q. Could not you see at a glance what the dangers were in making that coupling.

A. I don't know. There are lots of them made, I suppose, over the country. They say there are.

Q. Could not one see at a glance what the dangers in making that coupling were?

A. If I was going to make it and knew the danger I would not try to make it. That is all there would be about me if I was supposed to couple that shovel on the caboose.

Q. You could see it, couldn't you?

A. Well, I don't know. A man would not realize it, if he did.

Q. Why did you testify at the last trial that you could see at a glance how to use this coupling and what the dangers were?

A. If I did I did not take the real thought. Any man knows if you knew you were going to get killed you would not go in there.

Q. Certainly. That is not the question. Could not you see that it was necessary to keep down in order to avoid getting hurt?

A. Certainly. The man knew enough to keep down—that is sure as the world—and he tried to keep down.

Q. He did know enough to keep down?

A. If he had not known enough he would have got caught in the breast and not through the head,—if he did not know enough.

194 Q. You have seen lots of draw bars in your time, haven't you?

A. Not a great lot, no, sir.

Q. You have seen draw bars, haven't you?

A. I know what a draw bar is, yes, sir.

Q. Didn't all brakemen know what draw bars were?

A. All brakemen?

Q. Yes, sir.

A. They are supposed to.

Q. They knew how to make couplings of that kind, didn't they? Didn't Mr. Schlemmer know how to make that coupling?

A. I don't know whether he knew how or not.

Q. You said you were let out by the B. R. & P. What did you mean by that?

A. I got discharged. There were no hard feelings at all. I am telling the truth, as nearly as I know how.

Redirect examination by Mr. TRUITT:

Q. You testified on cross examination, when they asked you "didn't Mr. Schlemmer know how to make that coupling" that you didn't know whether he knew or not.

A. That is exact. I did not, now. I suppose he did, but I could not say for sure.

Q. Was there anything there connected with that that he ought to have been instructed about?

A. I suppose there was, if he did not notice those things.

195 Q. What was there there that he should have been instructed about?

A. About that extending out over there. If he would have kept down—if he did not he would get killed, if he got over there. Anybody knows that. It did kill him.

Q. Then he should have been instructed that that end of the shovel car would go over the automatic coupler. Is that what you mean?

Objected to as leading.

By the COURT:

Q. Just state, if you can, what instruction you think he ought to have had, if any, in making that coupling with safety.

A. He was an experienced man. How long he had worked I don't know. Probably if some man had said to keep down or had watched him, or something like that, or had drawn his attention to it, he might have kept down. I don't know.

By Mr. TRUITT:

Q. Do you think that is the instruction he ought to have had, to have kept down and watched himself?

A. I believe so. If he had kept down and watched himself he would not have got killed. He kept down—I would not say he did not—for he appeared to be a good railroad man and everything.

196 Q. What do you say as to his being entitled to instructions how the one car overlapped the other?

Mr. M'CAULEY: Objected to as leading, in the face of the testimony the witness has just given.

By the COURT: Yes, there is no evidence that that could not have been observed by anybody that went up there to look at the cars. And if any ordinary man could observe that, even without railroad experience, he would not need instructions about it.

Q. Taking a man of Mr. Schlemmer's experience, that coming on him suddenly to do—that coupling—would an ordinarily observant railroad man notice that the shovel car would overlap the automatic coupling, if called to make it for the first time?

A. No, sir, I don't believe he would notice that part of it. I don't believe he would, and I have a little experience myself. I don't believe he would.

Q. Then, what do you say as to the necessity of instructions about that, about it overlapping?

A. Probably if he had had instructions he would not have got killed.

Q. Ought he to have had the instructions?

A. I believe if he had of he would not have got killed.
197 Whether he ought or not I don't know, but I believe if he had had he would not have got killed.

Q. Would you say—taking that question again, as to the result of missing the coupling—whether he ought to have been told about that result?

A. If he missed it it would come square together, like that.

Q. Should he have been told that?

A. Probably he knew. I don't know.

Q. Would he naturally observe that, that they would come together the way they did?

A. I don't know. Probably he would and probably he would not. I would not say.

Q. From your experience and from his experience there how would it be in going in there—a reasonably observant flagman—as to noticing the absence of bumpers or dead woods there: what would you say as to that, whether he would notice that they were not there or not?

A. I don't suppose he would. He would not have time to.

By the COURT: Which car are you referring to?

Mr. TRUITT: Both of them.

By the COURT: As I understand, he was standing right
198 there at the caboose all the time they were taking the train up from the siding.

By Mr. TRUITT:

Q. I am referring to the absence of it on both of them. Would he as a reasonably observant railroad man or flagman, observe the absence of bumpers on both of them, going in as he did?

A. I suppose that he would notice that there were no bumpers on the caboose, working there as he did, about it; but as to the other car I don't know.

Q. Was that the only thing he had to think about there, whether there were bumpers?

Objected to as incompetent and irrelevant.

Q. Was that the only thing he had to think about there—whether there were bumpers—as a reasonably observant flagman?

By the COURT: The objection is overruled, and a bill of exceptions sealed to the defendant.

A. I don't know exactly, myself. Probably he had to think about making that coupling. I suppose I would, if I was in the same

place. If I had been in the same place probably I would have thought of making the coupling. No doubt I would have. Of course I could not tell what he was thinking of at the time.

199 Recross-examined by Mr. GORDON:

Q. Could not any man of ordinary intelligence see that steam shovel?

A. Could not he see the steam shovel?

Q. Yes. He could see it, couldn't he?

A. Certainly.

Q. And any man knew it was an unusual object, didn't he?

A. He didn't see it every day. That is sure as the world.

Q. Wasn't it unusual?

A. I said so a moment ago, that it was, yes, sir.

Q. Any one could see that it was not an ordinary car, couldn't he?

A. Oh, it was an ordinary car, but the shovel was built on top of it.

Q. What?

A. The car looked like any other flat car; but the shovel was put on top of it.

Q. Did you think it was an ordinary box car, or didn't you?

A. Oh, no. A man with one eye would know it was not a box car. I knew it was not a box car. Anybody would know that.

Q. And anybody would know it was not a steam shovel, wouldn't they?

A. I don't know whether anybody would know it was a steam shovel or not.

Q. You knew it was a machine of some kind?

A. Certainly.

200 Q. Any one could see that, couldn't he, if he was standing there and looking at it?

A. Anyone would know it was not over the track every day, certainly.

Q. Wasn't Mr. Neilson, conductor of Mr. Schlemmer's crew, standing beside the car when the accident happened?

A. Yes, sir, he was.

Q. And Mr. Coates, superintendent of the shifting crew?

A. He was, yes, sir.

Q. And Mr. Casey, the engineer in charge of the shovel?

A. I didn't know him. I didn't notice him.

Q. Wasn't there a third man standing right by this caboose when the accident happened?

A. Ernje Reed, the brakeman, was there.

Q. There were three men, weren't there?

A. There were Coates and Neilson and Ernje Reed, I believe, if I remember right. I would not say for certain.

Mr. LEE E. MEADOWS, called as a witness by the plaintiff, sworn.

Examined by Mr. TRUITT:

Q. Where do you reside?

A. Punxsutawney.

Q. In this county?

201 A. Yes, sir.

Q. What is your occupation?

A. Flagman and conductor.

Q. For what railroad?

A. The B. R. & P.

Q. The defendant in this case?

A. Yes, sir.

Q. How long have you worked for the defendant?

A. Between 8 and 9 years.

Q. Did you tell us what you do?

A. I am flagging at this time.

Q. On August 5, 1900, the date of this accident, who were you working for?

A. I was working for the B. R. & P. Railway Company, under Conductor Neilson.

Q. And what were you doing then?

A. I was braking.

Q. Do you remember the evening this accident took place?

A. Yes, sir.

Q. Where did it take place?

A. Just north of Brady street crossing.

Q. In what town?

A. Du Bois.

202 Q. On the lines of what railroad?

A. The B. R. & P.

Q. It is the defendant in this case?

A. Yes, sir.

Q. Where does its railroad run from?

A. I understand it runs from Buffalo and Rochester.

Q. In what state?

A. To Butler.

Q. Buffalo and Rochester are in what state?

A. In New York state.

Q. And down in Pennsylvania to where, do you say?

A. To Butler I understand.

Q. Does it run through Clearfield County?

A. Yes, sir.

Q. And Jefferson County?

A. Yes, sir.

Q. Did you know Adam Schlemmer?

A. Yes, sir.

Q. How long had you known him before this accident took place?

A. I could not say just how long. I suppose probably a year, to the best of my knowledge.

Q. Had you worked with him?

A. Yes, sir.

203 Q. Do you know how long he had worked at railroading before this took place?

A. No, sir.

Q. The day that this took place were you with him before it took place?

A. Yes, sir, I was with him, all day, from the time we were called at Punxsutawney to come out.

Q. And you went from Punxsutawney where to?

A. To Du Bois.

Q. Were you with him at Du Bois?

A. Yes, sir, all the time we were there.

Q. Do you know whether he saw this shovel car before he had to couple it or not?

A. He saw it—of course he did—but that is all. He was with me. We went down to get the train. He saw it when they pulled it out, I suppose, is all.

Q. Had he seen it before that?

A. I don't know whether he ever saw it any other day or not, but he had not seen it on this day that I know of.

Q. Do you know whether he had seen the coupling or not that day he undertook to couple it?

A. I don't think he saw it until they pulled the car out and backed down to make the coupling.

Q. Where did this shovel car come from?

A. I don't know.

204 Q. Do you know when it got into Du Bois?

A. No, I don't know just what time it got into DuBois.

Q. Where did you find this train of cars with the shovel on it?

A. We picked it up in what we call the South yard, on No. 1, or No. 2—I would not say which track, but one of those two tracks.

Q. What did you undertake to do with it?

A. We coupled onto the train, and the steam shovel was on the rear end of the train; and we backed onto the main track to couple onto the caboose that was standing on the main track.

Q. The caboose was standing on the main track.

A. Yes, sir.

Q. Was it towards Fall Creek?

A. The caboose was on the north end. We were headed south.

Q. Then which way were you backing this train when this coupling had to be made?

A. We were backing the train north.

Q. Was the caboose standing still when the coupling was to be made?

A. I was not just at the caboose, but it certainly would be standing still. We cut it off there and there was not anything to move it.

Q. When you go to couple on a caboose what is the usual manner of doing that?

A. You usually back it up and couple onto it.

205 Q. Back up what?

A. Back the train up and couple on.

Q. When that train backed up there where was Schlemmer? Do you know where he was?

A. I left him back near the caboose. I was on the rear end of the train, between the first and second cars. That made it one car and the length of the steam shovel that I was from the caboose when the coupling was made.

Q. There was a car between you and the steam shovel?

A. Yes, sir.

Q. And where do you say Schlemmer was when the train was back there: was he with the steam shovel or was he at the caboose?

A. He was standing at the caboose, the last I saw of him.

Q. So far as you know had he ever seen that steam shovel or the coupling on it until it approached there?

A. No, sir, not so far as I know.

Q. So far as you know did Adam Schlemmer ever see the shovel car or the coupling on it until it approached him there for him to make the coupling?

A. Not until we got hold of the train and pulled it out. He probably saw the car when we pulled it out of the siding; but I was with him all day, and he didn't see it.

Q. Do you know whether he did or not?

A. I know I was with him all day and I didn't see it until
206 we were called to take the train out and went down and coupled on to it and pulled it out of the siding.

By the COURT: I understood the witness to say a minute ago he saw it when he pulled the train out of the siding.

Q. Do you know whether he did or not? Did you say he did see it?

A. I was with him all day, I say, and I didn't see it. I do not see why he could.

Q. Do you know whether he saw it or not?

A. I know that he did not, for he was with me and I did not see it.

By the COURT:

Q. Didn't see what?

A. Didn't see the shovel until we were called to take the train out, just as I said before.

Q. But the question is now whether he saw it at all or not until the coupling was made, as I understand the question.

By Mr. TRUITT:

Q. You say that you were with Adam Schlemmer that whole day. What do you say as to whether he saw that shovel car and the coupling on it before it approached him there when he was standing at the caboose when he was required to make the coupling?

207 A. He possibly saw it when it pulled by him. That is the only time. When it was standing on the siding.

Q. How long did he see it then?

A. He did not see it very long,—pulling out on the switch there.

Q. Long enough to examine it?

A. No, not long enough to examine it.

Q. From the time it went back there how long was it until the accident happened when it approached him there?

A. Do you mean from the time when we pulled out of the siding and backed it up?

Q. No, sir. From the time it approached him until the accident happened.

A. It was not but a very few minutes from the time we pulled it out of the siding until we backed down the main track to make the coupling.

Q. How long was it from the time it approached him to make the coupling? Did the car stop, or did it go right on back, and did he attempt to couple it?

A. It backed up very steady. I was on the rear end of the train and I got up there and set up a couple of brakes; and we backed up there very slow to make the coupling.

Q. Can you give us the time from the time it approached him and he was standing at the caboose—can you give us the approximate time that elapsed from the time it approached him and he saw it until the accident happened?

208 A. No, sir, I could not.

Q. About how long?

A. It was a very few minutes.

Q. This shovel car: what kind of trucks had it under it?

A. It had four wheeled trucks under it, the same as any other ordinary car.

Q. How many of those trucks?

A. Two trucks, with four wheels to each truck.

Q. Did it have sides on it—the shovel car?

A. It was simply a steam shovel car, I would call it.

Q. Did it have sides on it?

A. Yes, sir; it was about the same as any other steam shovel.

Q. Did it have a roof on it?

A. Yes, sir.

Q. Did it have windows in it?

A. I don't remember about the windows.

Q. What did it look like?

A. It looked just about the same as any other steam shovel car.

Q. And what was built in it or on it, if anything?

A. It was just a steam shovel.

Q. And what did they do with this steam shovel?

A. It was used for contractor's work.

Q. Was it used to shovel dirt with?

A. To shovel dirt, yes, sir.

209 Q. On the end next to the caboose what kind of a coupling did it have on?

A. It had a solid cast draw head, I would call it, fastened onto the body of the steam shovel.

Q. To the bottom of the steam shovel?

A. To the body of the steam shovel, on the end of it.

Q. You say the draw head was fastened on the shovel car?

A. Yes, sir.

Q. Whereabouts was it fastened on?

A. It was fastened on the end of it—about the center of the end of it—and the draw bar entered into that to couple onto other cars.

Q. Was it fastened under the end—the draw head?

A. Yes, sir, it was fastened under the end.

Q. How far back from the end.

A. I would not know just how far. I would judge two or three feet. I could not just say.

Q. Was the draw bar fastened to that draw head under there?

A. The draw bar was put in with a link and pin put into the draw-head; and the pin went down into the draw head.

By Mr. GORDON:

Q. You said a link and pin. Did you mean that?

A. No, sir, I mean a pin.

210 By Mr. TRUITT:

Q. My question is, was the draw bar fastened into the draw head?

A. Yes, sir, it was put in there with a pin.

Q. This draw bar. Describe that to the Court and jury—the length of it.

A. I did not measure it, but I would judge it was two feet and a half or three feet long. I would not say, for I don't know.

Q. How much would it weigh?

A. I would judge it would weight 75 or 80 pounds. I don't know that, either, for I never weighed it or saw it weighed.

Q. When it was not in use where was it?

A. That is the first time I ever saw it, when it was hanging down there, into the draw head.

Q. How long had you railroaded before this 5th of August 1900?

A. Between 9 and 10 years I think. I could not just say. I went to railroading in 1889.

Q. How many of those draw heads with a draw bar coupling like that—in your ten years of experience prior to that date how many such couplings did you ever see like this, with this draw head and a draw bar hanging down?

A. I never saw one just the same as it. I have seen draw bars before, but I never saw one just the same as that.

Q. The ones that you saw before: where did they use them?

A. I can remember when they used to use them, when they carried them on the back of the track. We called them goos-necks

211 Some were crooked and some were straight.

Q. Weren't they used about the locomotive and tank?

A. They were used on the engine when there was one draw head higher than the other.

Q. Have you ever used one like this before?

A. I never used one just the same as that, no, sir.

Q. Did you ever see Mr. Schlemmer use one before?

A. No, sir.

Q. Did you ever see a shovel car equipped this way before?

A. I never remember of seeing one.

Q. Do you know whether Mr. Schlemmer did or not?

A. No, sir, I don't know.

Q. What was on the end of the caboose, Mr. Meadows?

A. There was a draw head on the end of it, and there was a kind of a frame ther-. There was a platform and there were rail-

ings that go around. There were two boards that come straight up from the wheels.

Q. That railing was on the end of the caboose?

A. Yes, sir.

Q. And then between the end and the house of the caboose, like what was in there: was there a platform, I mean?

A. On the caboose, yes, sir.

Q. And how would you get to the platform: how would you get up in it?

A. There were steps to get up on it.

212 Q. On each side?

A. Yes, sir.

Q. Now, out there around that railing: were there any boards there?

A. Yes, sir.

Q. What do you call those boards?

A. I always called them splash boards. I don't know what the proper name is. I never heard any other name.

Q. Why were they called splash boards?

A. From what I can understand they were put there to kind of protect the caboose from the grease flying up from the wheels on the cars.

Q. What kind of coupling was on the caboose?

A. A Trojan coupling; automatic.

Q. Taking the model there that we have offered in evidence: what was it like as compared with that?

A. It was not the same as this one. This is similar to the same thing. It was an automatic coupler.

Q. What was the difference?

A. The only difference is the difference in the coupling, and there is difference in the operating rod. This business operates from the top here, and the Trojan operates from the side. There is a rod that goes in there where you cut the cars.

213 Q. Then did the one that day have the slot in like that one?

A. Like this?

Q. Yes, sir.

A. It had that.

Q. And what was the size of that hole in that one that day?

By Mr. M'CAULEY:

Q. Did you examine that coupler particularly that day?

A. On the caboose?

Q. Yes, sir.

A. I was working on the car.

Q. Did you examine it at that time particularly?

By Mr. TRUITT: Or at any other time.

By Mr. M'CAULEY:

Q. That particular coupler on that caboose.

A. No, I didn't examine it particularly, but I know it was a Trojan coupler.

Q. Did you examine that particular coupler at any time?

A. No, sir.

By Mr. TRUITT:

Q. Was that different from any other coupler—the one that was on there?

214 A. No, sir.

Q. Then what was the size of the hole in it?

A. You mean in the nuckle here?

Q. Yes, sir.

A. I never measured it, but I suppose about two inches and a half or probably three inches.

Q. And what was the size of the end of the draw bar that was to be inserted in that hole?

A. I don't know the size of that. I didn't measure it. But smaller than the hole, anyways. It was supposed to go in there, and it had to go in.

Q. Was there a hole in the free end of the draw bar?

A. Yes, sir.

Q. And to couple it to the automatic coupling did you use a pin?

A. Yes, sir, there was a pin the same as this business here that went down through; and you entered the draw bar here and dropped the pin and it went through the knuckle into the draw bar.

Q. How far out from the end of the caboose or from the ends of cars did these Trojan couplers stick out or go out?

A. I suppose 12 or 14 inches. I judge about that.

Q. Did you notice the height of the bottom of the shovel car?

215 A. I noticed after it was coupled on that the draw bar was just about on the level: after it was coupled on that it was just about on a level from where it went into the draw head.

Q. Did you notice whether the end of the shovel car would strike the automatic coupler or what would happen?

A. The end of the shovel car that extended over this draw head and draw bar was higher than the platform of the caboose. It would miss the platform of the caboose that came over this draw-head on the caboose.

Q. And how was it as to missing the automatic coupler—the end of the shovel car: would it miss the automatic coupler?

A. Yes, sir, it would miss the automatic coupler, if you did not enter this draw bar into the end of the coupler.

Q. How was it that evening as to being daylight or dark; how was that, Mr. Meadows?

A. It was kind of dark. It was between 8 and 9 o'clock, as well as I can remember. It was 8:40 or 8:45 or somewhere thereabouts. I would not know just what time.

Q. Do you know whether the men had lanterns lit or not?

A. Yes, sir, I know we did.

Q. Had you yours lit?

A. Yes, sir.

Q. Do you know whether Mr. Schlemmer had?

216 A. He lit them all up. The flagman usually lights the lamps.

Q. Did you see him with his?

A. He had his lamp on the caboose, yes, sir, when I left there.

Q. Just before he made the coupling where was the last time you saw him just before the accident? Where was the last time you saw Adam Schlemmer alive?

A. Back at the caboose.

Q. How long after that until this accident took place?

A. I could not tell you just how long. We simply pulled the cars out of the switch, and I threw the switch and got up on the rear of the train, and we backed down to make the coupling. A very few minutes.

Q. What took place when the coupling was made?

A. We backed up.

Q. Fast, or gently, or how?

A. We backed up very steady, as steady as a man could move an engine, I think.

Q. Then what took place?

A. I was standing there; and I think—as well as I can remember—it was the man that was with the steam shovel came over and said to me, "Go back there. That flagman got killed."

Q. Did you go there?

A. Yes, sir.

Q. When you went there what did you see?

A. I saw him laying outside of the track, on the right hand side.

217 Q. Who was that?

A. Mr. Schlemmer.

Q. Was there anything wrong with him?

A. Yes, sir, he was hurt.

Q. Where?

A. On the top part of his head.

Q. About how much of his head?

A. I suppose an inch or an inch and a half. It was very nearly the top of the head.

Q. Did he live or die, from the effects of that?

A. He died.

Q. Whose employ was he in at that time?

A. The B. R. & P. Railway.

Q. The defendant company?

A. Yes, sir.

Q. Did you make any examination there with anybody to see where his head was caught?

A. Not at that time, no, I did not make any examination.

Q. Soon afterwards?

A. I was told where he was caught there.

Q. Did you examine, Mr. Neilson, or somebody, and see any place there afterwards?

A. The next day there was some hair on the board. I don't know whether it came off his head or whether it was his hair.

218 Q. Who was there when you made that examination?

A. I don't remember. I worked on the car right along, and I rode in it every day when I was working.

Q. Was it human hair?

A. I don't know. It looked to be.

Q. Where was that?

A. It was on the splash board, on the right hand side.

Q. What resemblance did it have to Adam Schlemmer's hair?

A. I know it was hair, and I supposed it was his—that it came off his head—after I was told that he was caught there.

Q. Did you couple that caboose to the shovel car afterwards?

A. I helped to do it, yes, sir.

Q. How did you do it?

A. We shoved the caboose on, I think, as well as I can remember.

Q. Who did the shoving or pushing?

A. I don't know. I helped to do it. I don't know who else.

Q. You pushed the caboose up against the shovel car?

A. Yes, sir.

Q. Was anybody injured when you did that?

A. No, sir, there was nobody injured.

Q. Was that a safer way to make it than the way you undertook before?

A. A man could get caught in there: but the only difference there would be when they were shoving the caboose it was lighter than the weight of the train.

219 Q. (Question read.) By pushing the train up against the caboose: was it safer for you men to push the caboose down to the train than for the train to be pushed back—shovel car and all—to the caboose?

A. Yes, sir, I think it was some safer.

Q. From your ten years' experience: have you worked on railroads since that date?

A. Yes, sir, I have followed it up.

Q. Then you have had much experience?

A. I have had 15 or 16 years' experience.

Q. From your experience what would you say as to that that evening being a safe coupler or not?

A. It was not as safe as lots of other couplings.

Q. What would you say as to a reasonably observant flagman, like Adam Schlemmer, with the experience he had—what would you say as to his going in there—whether he would notice that that bottom of the shovel car would overlap and come against the ends of the caboose?

A. If a man had not noticed it, I would not think he would take notice of it just going in there to make the coupling.

220 Q. What would you say as to his observing or not observing that there were no bumpers or draw heads on either the shovel car or the caboose to keep them apart?

A. A man could see that there were not any on either.

Q. The time he had to see this that evening and to do that, would he notice that there were none on, as a reasonably observant flagman: would he notice the absence of those things there?

Mr. M'CAULEY: Objected to as the witness does not know what opportunities the deceased had for observing. Objected to as incompetent, irrelevant and immaterial.

By the COURT: I doubt very much whether the witness knows his opportunities for observing. I do not think this is competent. Do you want this question answered, Mr. Truitt?

Mr. TRUITT: Yes, sir.

By the COURT: Very well. The objection is overruled, the testimony admitted, and a bill of exceptions sealed to the defendant.

Q. (Question read.)

A. I would think a man would notice them not being on.

221 Q. Would he have observed the result of missing the coupling?

Mr. GORDON: Objected to as incompetent and irrelevant.

By the COURT: The objection is overruled, the testimony admitted, and a bill of exceptions sealed to the defendant.

A. I don't just understand that.

Q. Would he as a reasonably observant brakeman, from what he saw there that evening when that was thrust upon him—would he have notices the result of missing that coupling?

Mr. GORDON: Objected to as incompetent and irrelevant.

By the COURT: The objection is overruled, the testimony admitted, and a bill of exceptions sealed to the defendant.

A. Oh, I don't know that he would.

Q. How was it as to that being a usual or unusual coupling to make?

A. Yes, that kind was an unusual.

Q. How was it as to being a difficult coupling to make.

A. I would call it quite a difficult coupling to make.

Q. Could he see all the dangers there when he went in there?

222 A. I don't know what he could see. I didn't make it, you know.

Q. What was the ordinary coupling in use on that day on this railroad?

A. The automatic coupling was the most in use. There were some link and pin couplings at that time, but very few.

Q. Is it necessary for men to go in between the cars to make automatic couplings?

A. No, sir.

Q. Was it necessary for Mr. Schlemmer to go between the cars to make that coupling?

A. Yes, sir, it would be necessary for him. I would think it would be necessary for him.

Q. How as to going between the rails?

A. If I was going to make it I would get between the rails, and raise the draw bar up with my right hand as the car came back—if I was on the same side as they say he was on.

Cross-examined by Mr. GORDON:

Q. The draw head on the end of the steam shovel was an ordinary single pocket solid draw head, wasn't it?

A. That I cannot tell you—whether there were two pockets in it or one; but it was a cast draw head, fastened onto the end of the steam shovel.

223 Q. Both single pocket and double pocket drawheads were in very common use prior to the introduction of the patent coupler, were they not?

A. There used to be quite a few of them. They were not at that time, though. That is, I never saw any of them.

Q. It was the ordinary drawhead was it not?

A. On the steam shovel.

Q. Yes, sir.

A. It was the same style as the old skeleton draw head—I called them when they used to use them—with the draw head fastened into them?

Q. And up until the introduction of the patent coupler they were used on all cars, were they not?

A. Yes, sir, the same style of draw head was: only this,—if I can remember right—was bolted onto the car and the most of other draw-heads were put in with a spring.

Q. Then the only difference was the method of attachment of the drawhead to the steam shovel?

A. How is that?

Q. Then the only difference was one of attachment, the method of attaching the one to the steam shovel—the draw head to the steam shovel?

A. I don't remember. There were no bumpers on the steam shovel, which would not be necessary after putting the draw bar in, for it would not reach out there anyhow.

224 Q. Then if there had been bumpers it would not have prevented the accident, would it?

A. If there had been bumpers on the steam shovel?

Q. Yes, sir. It would not have prevented the accident.

A. Not without there had been pretty long ones.

Q. The draw bar was simply a piece of straight iron with a hole at both ends, was it not?

A. Yes, sir.

Q. The only way in which it differed from the ordinary draw bar was that it was a little bit heavier?

A. Yes, sir, it was heavier than any that I ever saw.

Q. That was the only difference, was it not?

A. You mean in making the coupling?

Q. No, I mean in the draw bar itself?

A. In the draw bar, yes, sir.

Q. Draw bars were well known to all brakemen, were they not, of any experience?

A. I don't know. I understood what draw bars were, and used some of them, but not of that kind.

Q. You did use draw bars frequently?

A. Not at that time I did not; but I have seen the time, before that, that we did use them.

Q. Mr. Schlemmer understood how to make this coupling, didn't he?

A. I don't know.

225 Q. All that was necessary to do was to raise up the free end of the draw bar and insert it into the hole in the knuckle?

A. Yes, sir; and keep his head down, that that business that was higher than the platform of the caboose did not strike his head.

Q. And if he kept his head down there would be no danger, would there?

A. No, if he did not get knocked down in there and get run over.

Q. If he kept his head down there would be no danger unless he would be knocked over or run over?

A. No, sir, not any more danger than getting his hand caught.

Q. Didn't you in the first instance back the train up to within about four feet of the caboose, and stop?

A. Before he made the attempt to couple the car?

Q. Yes, sir, before he attempted to couple the car?

A. I would not say whether we stopped or not.

Q. You would not say that you did not stop?

A. No, sir, I would not say we did not. I remember we backed up very slow. I don't know whether we stopped before he attempted to make the coupling or not.

Q. There was plenty of light to enable him to see what kind of a coupling there was on the shovel, wasn't there?

A. You say he had a light?

226 Q. I say there was plenty of day light left to see what kind of a coupling apparatus there was on the shovel?

A. You can judge for yourself about how dark it was. As near as I can remember it was about 8:45, or thereabouts.

Q. You have said it was much safer to shove the caboose back by hand in making this coupling. Could that be done without much danger?

A. If you did not get caught in there.

Q. That was the safe way in which to make the coupling, was it?

A. Yes, sir, it was safer than backing the train up.

Q. I believe you sp-ke of the difficulty in making this coupling. It was a mere question of raising the draw bar and inserting it in the hole in the knuckle, wasn't it?

A. Yes, sir, to raise the draw bar and enter it into the hole.

Q. Didn't the draw bar stand at an angle of about 30 degrees or less,—that is, in the shape in which I hold this pencil, (indicating), my fingers being the draw head?

A. Yes, sir.

Q. Then all you had to do was to raise the draw bar up in that way (indicating) and bring the end of it into the slot in the knuckle, was it?

A. Yes, sir. I don't know just how many degrees—or anything—it hung down. I cannot remember that. But I know it hung

down there; and it was to be raised up in there and entered, and drop this pin.

Q. The pin would drop itself, wouldn't it?

227 A. If you take those draw bars—you have to pretty nearly get it right to get it in there.

Q. It was not Mr. Schlemmer's place to drop the pin, was it?

A. I don't know who was dropping the pin.

Q. Wasn't that coupler about the simplest form of coupler known?

A. The simplest form of coupling known?

Q. Yes, sir.

A. No, sir.

Q. What was simpler than that?

A. The automatic is the simplest that ever I used.

Q. Isn't that a great deal more complicated than a straight piece of iron with a hole at each end?

A. What I mean is easiest to make.

Q. I understand. But the coupler itself: the draw head and the draw bar were simple?

A. Yes, sir, there was not much to it.

Q. Any one could see how to use it at a glance, couldn't he?

A. Yes, sir, you could see. Anybody could see it.

Mr. JAMES CHOCHRAN, called as a witness by the plaintiff, sworn; examined by Mr. TRUITT.

Q. Where did you live on August 5, 1900?

228 A. In Du Bois, on South Brady street.

Q. Where were you when this accident took place?

A. Sitting up on Hoover's porch, if I remember correctly.

Q. Who was with you?

A. I. H. Hoover.

Q. Did you see the shovel car?

A. I saw it, yes, sir.

Q. Where did you see it?

A. I saw it going down and passing the house, and I saw it coming back.

Q. When they were taking it out to the main line, do you mean, that you saw it?

A. Yes, sir.

Q. Did you see it when they were taking it up, too?

A. Yes, sir. That is the first I paid any attention to it,—when they brought it back.

Q. What made you notice it then?

A. Hoover called my attention to it, and made the remark something like this. He said, "We will see if that fellow makes that coupling", or something to that amount. He said, "It is a hard thing to couple".

Q. Did you notice the coupling on it?

A. Not in particular.

229 Q. What did you see about it?

A. I saw the draw bar, as they call it.

Q. Where was it?

- A. On the end of the steam shovel.
 Q. Hanging straight down, or over, or how?
 A. It looked to be hanging about in that shape (illustrating).
 Q. Down? Is that what you mean?
 A. Yes, sir.
 Q. When they backed the train, with the shovel car on the end of it, where was the caboose as to the main line?
 A. The caboose was setting a little north of the crossing, possibly 15 feet, I judge, or 20.
 Q. Was it standing still?
 A. The caboose was standing perfectly still.
 Q. Did you see Mr. Schlemmer that evening before this accident?
 A. I might have seen him. I did not know him.
 Q. Did you see him at the time the coupling was made?
 A. I saw him make the coupling, yes, sir.
 Q. Just tell the court and jury what you saw him do as the train went back to the caboose.
 A. I didn't pay any attention to him until Hoover drew my attention to it; and then I saw him when the caboose got within possibly 10 feet, I guess, or something like that, walk up to the steam
 230 shovel and get hold of this draw bar.

By the COURT:

- Q. That is, when the end of the train came within 10 feet of the caboose?
 A. Yes, sir, about that distance. I saw him get hold of this draw bar and lower his body: and when they came together then I could not see it.

By Mr. TRUITT:

- Q. What happened: what did you see when they came together?
 A. That is where I could not see—after they came together.
 Q. Could you see him under there?
 A. I could see him under the wheels.
 Q. When they came together and relaxed—slacked up—and went apart, then where was Schlemmer?
 A. The next I saw Schlemmer he was lying down by the rail.
 Q. That was after the cars——
 A. Came together.
 Q. Came together and went apart again. Is that what you mean?
 A. Yes, sir, after they had jarred the caboose back.
 Q. Which hand was he holding the draw bar with?
 A. I could not say for sure, but I think the right.
 Q. And where was his left hand?
 231 A. That I could not see, but I rather think when he got to the caboose that he put his hand on the caboose. I could not say for sure.
 Q. And was he facing you?
 A. He was facing me, yes, sir.
 Q. Do you know what time of day it was?
 A. I judge it was between 8 and 9 o'clock. I could not say for sure.

Q. Do you know whether the crew had their lights lit or not—their lanterns?

A. Yes, sir, that I remember: some of them, anyhow. I remember seeing lamps.

Q. Do you know whether Mr. Schlemmer had his?

A. I would not say for sure, but I rather think he had.

Q. Did you make an examination of that caboose or shovel car after the accident?

A. No, sir.

Q. Do you know anything about the height of the bottom of the caboose and the bottom of the shovel car?

A. I didn't examine it at all.

Q. Where was Adam Schlemmer when he undertook to make this coupling, as to the rails, when you saw him?

A. I think he had one or two feet over the rail—the rail
232 next to Brookville from where Du Bois is.

Q. After the accident did you go over to where he was?

A. Yes, sir.

Q. Where was he when you got over there?

A. Somebody had him in his arms again — I got down there. We ran right down.

Q. Who had him in his arms?

A. I could not say, but there was some man.

Q. What was wrong with him?

A. The top of his head was crushed.

Q. About how much of it?

A. I could not say. I did not examine it. I hated to look at it, to tell the truth. I just noticed it and then turned away.

Cross-examined by Mr. GORDON:

Q. How far away were you from Mr. Schlemmer when he was injured?

A. I judge it was between about 50 feet, as near as I can tell, and 60 feet.

Q. Was there still plenty of day light left to enable you to see clearly what was going on?

A. It was not dark.

Q. You could see distinctly from that distance, could you?

A. I could see, yes, sir.

233 Redirect examination by Mr. TRUITT:

Q. Did you know Mrs. Cristina Fascett?

A. Yes, sir.

Q. She was a witness on the first trial here. Do you know where she is now?

A. I do not.

Q. Have you inquired and tried to find out where she is?

A. Yes, sir. I was requested by some gentleman in Du Bois to find out.

Q. On my part. From me?

A. From somebody.

Q. Could you find out anything about her?

A. No, sir.

Q. You don't know where she is?

A. No, sir. I heard her daughter say in Bradford, but I could not say positively about that.

Mr. A. W. PENTZ, called as a witness by the plaintiff, sworn.

Examined by Mr. TRUITT:

Q. Where do you reside?

A. Punxsutawney.

Q. What is your occupation?

234 A. Flagman and conductor.

Q. On what railroad

A. The B. R. & P.

Q. The defendant in this case?

A. Yes, sir.

Q. How long have you been employed in railroading?

A. A little over 16 years.

Q. I want you to state whether you ever saw this draw bar coupling on this shovel car?

A. On this particular shovel car?

Q. Yes.

A. Yes, sir.

Q. Where did you see it?

A. In Punxsutawney, the next morning after Mr. Schlemmer was killed.

Q. Did you make an examination of that draw bar?

A. We went to see it. After hearing of him being killed we went to see it.

Q. Did you make an examination of the shovel car, as to the height of it and all that?

A. Not particularly as to the height. I noticed that it was higher than a common ordinary car.

Q. How as to its going over the draw head on a caboose?

A. It would.

235 Q. The automatic coupler?

A. Yes, sir, it would.

Q. Can you tell us about the weight that draw bar was?

A. I judge it would be about 75 or 80 pounds, or along there, by the appearance.

Q. At that date what was the usual and ordinary coupling on cars on railroads?

A. The automatic coupler was the chief coupler.

Q. What was the size of the end of that draw bar? Did you observe, Mr. Pentz?

A. I judge it would be between an inch and a half and two inches thick, and about four inches wide.

By the COURT:

Q. You mean the end that goes into the slot?

A. Yes, sir. And the free end is rounded.

By Mr. TRUITT:

Q. That slot in the automatic coupler that it had to be coupled in: What is the size of that hole in a Trojan coupler?

A. I never measured one, but I suppose about $2\frac{1}{2}$ inches from top to bottom: that is, the slot.

Q. And how wide?

A. Possibly three inches.

Q. Do I understand you that that bar was four inches
236 wide at the end where you put it in?

A. Four inches wide?

Q. Yes, sir.

A. Yes, sir.

Q. Or was it all that wide?

A. The whole width of the bar, yes, sir.

Q. The end was,—the free end?

A. Yes, sir.

Q. And how wide was the hole it would go in?

A. You mean this way? (Illustrating on model.)

Q. Yes.

A. It was all of three inches.

Q. I mean across, then.

A. It was between three and four inches.

Q. After the end of that draw bar was inserted in that slot was there any play left in there?

A. I don't know. I didn't see that coupler. I didn't see it coupled with the draw head.

By the COURT: I don't understand from the witness' testimony how it could be inserted at all. If the draw bar was four inches wide and the slot from three to four inches, I don't understand how it could go in.

237 (WITNESS:) From the center of the draw bar there would only be about two inches on either side.

Mr. GORDON: You see this slot in the knuckle is only about half the width of the draw bar, but it is open around here (illustrating).

By the COURT: If I understood the witness' testimony it would not go in at all.

By Mr. McCAULEY: I would like to know whether this witness saw that caboose at all.

(WITNESS:) Not at that particular time. I have seen that caboose many times.

Q. How do you know it was the particular caboose in question at Du Bois?

A. I did not see that caboose when I saw the steam shovel.

Q. You were not at Du Bois.

A. Not at Du Bois.

Q. At the time of the accident?

A. No, sir.

Q. Then you don't know what caboose was in use at that time?

A. No, sir.

238 Q. Except by hearsay or what somebody told you?

A. That is all.

Q. Then you don't know of your own knowledge what caboose was at the accident?

A. No, sir, only from hearsay.

Q. Then you don't know anything about whether this bar would enter the draw head of the caboose or not?

A. No, sir.

Q. You are simply testifying, then, as to something that somebody told you as to the caboose?

A. As to the caboose, yes, sir.

By Mr. TRUITT:

Q. You do know what an automatic Trojan coupler is?

A. I know what a standard Trojan coupler is, yes, sir.

Q. And if that was a Trojan coupler—as the evidence shows—on the end of the caboose, then you do know what that Trojan coupler was, do you?

Objected to as argument.

Q. Do you know what a Trojan coupler was?

A. Yes, sir.

Mr. McCAULEY: My objection is that the witness cannot testify, as to the width of the slot in the caboose at that time, because he does not know.

By the COURT: He says he knows what a Trojan coupler is, and he may testify as to the size of the opening in a Trojan coupler, if he knows. If that Coupler was any different from an ordinary Trojan coupler I think the burden is on the defendant to show that fact.

By Mr. TRUITT:

Q. What were the couplers in general use on railroads at the date that this accident took place?

A. I have answered several times that they were automatic.

Q. Did they couple automatically by impact?

A. Yes, sir.

Q. From your experience, I want you to state, after listening to the evidence in this case, whether that was a safe coupling to make or not.

A. The draw bar coupler?

Q. Yes, sir, with the Trojan coupler.

A. I would not consider it safe.

Q. Why wouldn't you?

A. Because of the heft of the draw bar.

Q. The heft of it?

240 A. The heft of it, and of the overhanging or over extending house on the shovel car, and the position a man would have to get in to make the coupling.

Q. Were there any dead woods or buffers on the end of the shovel-car?

A. No, sir.

Q. Was it safe with them off or on: or how was that?

A. I would not consider it safe, no.

Q. From your experience, would an ordinary observant flagman in going in to make that coupling, suddenly thrust on him, notice that the end of the shovel car would go over the automatic coupler on the caboose?

Objected to as incompetent, irrelevant and immaterial.

By the COURT: The objection is overruled, and a bill of exceptions sealed to the defendant.

Q. (Question read.)

A. No, I would not think so.

Q. What would you say as to that coupling there of the draw bar to the Trojan automatic coupling—whether that was a difficult coupling to make or not?

A. Yes, sir, it was.

Q. What do you mean by that?

241 A. It was not an ordinary coupler; and a person not being familiar with it it would be considered a difficult coupling.

Q. Would it have been of any assistance to Mr. Schlemmer to have been instructed about that before he went in there?

A. I would think so, yes.

Q. Could he have been taught how to make it?

A. He might, if he had lots of them to make: he might learn how to make a coupling like that without danger.

Q. What instructions should he have had? After listening to the evidence here (you have sat there and listened to the evidence) from your experience what instructions do you say that he should have had?

Mr. McCauley: Objected to. There is no qualification shown in this witness to show what particular instructions railroad companies should give their agents. A man might be a brakeman for 10 years, but unless there is some qualification shown as to giving instructions it would be incompetent. We object to the question as incompetent, irrelevant and immaterial.

(Question withdrawn.)

Q. How many years experience do you say you have had?

A. Better than 16 years.

Q. In your better than 16 years experience in railroading have you ever made any couplings?

242 A. Have I?

Q. Yes, sir.

A. Oh, many of them.

Q. What do you mean by many: hundreds or thousands of them?

A. Thousands of them.

Q. Did you ever see a draw bar coupling like this one before?

A. No, sir.

Q. Were any such in use at that date, so far as you know?

A. There were draw bar couplings in use, yes, sir.

Q. Where?

A. I have seen them on the front ends of engines.

Q. Was that a straight or a crooked bar?

A. It was a straight draw bar.

Q. Was it fastened in a single pocket draw head like this?

A. No, sir. It was fastened into a cast that would leave it down onto the pilot when not in use.

Q. Did you ever see cars coupled with anything like this before?

A. Only when we used what is called a goose-neck.

Q. Is it a straight draw bar like this?

A. No, sir, it is crooked. It is for the purpose of coupling cars, where one coupler is higher than the other; and then the goose neck is probably only a foot and a half long.

Q. From what you have heard in this testimony as to the
243 conditions there at the time Mr. Schlemmer made this coupling and the time he had to make it, I want you to state to the Court and jury whether he should have been instructed, from your experience, and if so, what kind of instructions he should have had.

Objected to as incompetent, immaterial and irrelevant.

By the COURT: The objection is overruled, the testimony admitted, and a bill of exceptions sealed to the defendant.

A. From him not having seen the different peculiarities about this certain steam shovel—that is, taking from the evidence that he did not see it—(of course I could not say that he did or did not)—but taking from the evidence that he did not see it—I would consider that he should be instructed that this car hung over the draw head; for the reason that at the time the car would be backed onto the caboose he would not have time to observe these things. Some men might observe it, while others would not; although I could not say whether he observed it or not.

Q. As to the ends of the cars coming together: what do you say about that?

A. I don't think it was safe.

Q. Did you ever see that car, in your experience, before?

244 Mr. M'CAULEY: Objected to as incompetent, immaterial and irrelevant.

By the COURT: The objection is overruled, the testimony admitted, and a bill of exceptions sealed to the defendants.

A. No, not unless the cars were smashed, I never saw them coming together.

Q. Did you make any examination and observe where Schlemmer had got hurt on that?

A. No, sir.

Cross-examined by Mr. GORDON:

Q. Did you ever see any draw bars in your life before the time of this accident?

A. Not further than I have already stated.

Q. That is, you have seen a great many draw bars?

A. Not a great many, no, sir.

Q. Were they in use?

A. That kind, yes.

Q. Were draw bars in use?

Objected to as the witness has answered.

245 Q. Were draw bars in use—draw bar couplings?

A. As a general thing, yes.

Q. Didn't every switch-engine have a draw bar?

A. No, sir.

Q. Didn't a majority of them?

A. Some had.

Q. Didn't you see them frequently?

A. I have seen them.

Q. Didn't you make couplings with them?

A. Yes, sir.

Q. Do you know whether Mr. Schlemmer had made couplings with them or not.

A. I could not say.

Q. The draw bars that you used and had seen and had made couplings with were straight pieces of iron with holes at either end?

A. The draw bars that I had seen—what I would call a draw bar—had a hole at either end. What were used on the engine had the end that was fastened to the pilot beam—the hole was cross wise while the other one was up and down, so that the pin would go through that way (illustrating),—the end to be fastened to a car or coupled to a car.

Q. Were they a straight piece of iron with a hole at either end? That is what I asked you.

A. I don't know that I have ever seen other than what we
246 call a goose-neck, other than what was on the pilot of an engine.

Q. I don't care what they were. Were not those a straight piece of iron with a hole at either end?

A. Yes, sir.

Q. And wasn't this draw bar a straight piece of iron with a hole at either end?

A. Yes, sir, only different from the other.

Q. There was not anything complicated about it, was there?

A. No. A person could see what it was.

Q. And at a glance you could see what it was?

A. You might at times, yes, sir.

Q. All that was necessary in making this coupling was simply to lift up the free end of that straight piece of iron and guide it into the slot in the knuckle. Isn't that true?

A. Yes, sir, providing you had the strength to do so.

Q. That was what was needed, wasn't it?

A. Yes, sir. All that was needed was to lift the draw-bar up and insert it in the slot in the knuckle.

Q. That was all that was necessary?

A. Yes, sir.

Q. And the instructions that were needed were to keep your head down below the body of that shovel car?

247 A. He might have been so instructed. At the same time he could not do it.

Q. I don't care. But if he had kept his head down below the body of that shovel car could the accident have happened?

A. No, sir.

Q. Then, if he was ordered to keep down and had obeyed orders could he have been injured?

A. I don't know.

Q. How heavy were those straight draw-bars that you have seen on the pilots of engines?

A. Yes, sir, they were straight draw bars.

Q. How heavy were they?

A. I suppose they would weigh 75 pounds.

Q. And the goose necks were crooked pieces of iron, with a hole at either end?

A. Yes, sir.

Q. For the purpose of coupling cars of unequal height with the engine?

A. Yes, sir.

Redirect examination by Mr. TRUITT:

Q. I don't know whether we understand about the pilot of an engine. What is that: what is it generally called?

248 A. That is the correct name for it—pilot. That is what you would call, I suppose, a cow catcher.

Q. The draw bar that they use there, now. We will say that the front end of that engine—that they want to attach a car to the front end of the engine. Is that where they use that draw bar?

A. Yes, sir.

Q. When they go to do that there is nothing up above the end next to the engine, is there? Is there anything over that end?

A. Not unless you would be coupling onto a similar car to this steam shovel.

Q. The engine end: is there anything over that end of the draw bar?

A. No, sir.

Q. When that is not in use, that draw bar there on the front end of the engine—I will call it on top of the cow-catcher—where is that draw bar?

A. It hangs down on the nose of the pilot.

Q. And when they want to attach it to the car to the front end of the engine what do they do?

A. The man making the coupling stands on the foot plate of the pilot and lifts the draw bar up and inserts it.

Q. Does he have to get in under any cars in doing that?

A. No, sir.

249 Q. He stands outside?

A. He stands outside.

Mr. CHARLES ALLEN, called as a witness by the plaintiff, sworn.

Examined by Mr. TRUITT:

Q. Where do you live?

A. Punxsutawney.

Q. Did you ever railroad any?

A. Yes, sir.

Q. How many years?

A. About 17.

Q. Did you ever see this draw bar coupling?

A. Yes, sir.

Q. Where did you see it?

A. At Punxsutawney.

Q. When?

A. The day after Schlemmer was killed.

Q. Was it still on the shovel car?

A. Yes, sir.

Q. Where was Mr. Pentz when you were looking at it;
250 was Mr. Pentz with you when you were looking at it?

A. I don't think he was.

Q. Did you make an examination as to the bottom of the shovel car—whether it was higher or lower than the ordinary bottom of cars?

A. No, I did not make any examination. I just looked at the car. I didn't make any examination of it.

Q. You looked at it?

A. Yes, sir.

Q. Do you know whether it was higher or lower?

A. Yes, sir, higher.

Q. Which was it?

A. Higher.

Q. Do you know how much higher?

A. No, I don't.

Q. In your experience do you know what a Trojan automatic coupler is?

A. Yes, sir.

Q. A Trojan automatic coupler on a caboose at that date; how as to the shovel car when they came together—would they strike or what would happen?

A. The shovel car?

Q. Yes, sir. When you undertook to couple it to a caboose with a Trojan automatic coupler on tell us how they would be as to
251 height—whether the shovel car bed or bottom would strike the Trojan coupler.

A. This would not strike the coupler.

Q. Would it strike?

A. It would strike the top of the body of the caboose.

Q. Would it go over the Trojan coupler?

A. Yes, sir.

By the COURT:

Q. As I understand you it would go over the platform?

A. Yes sir.

By Mr. TRUITT:

Q. And strike the caboose?

A. Yes, sir.

Q. In other words, would the ends come together of the shovel car and the caboose?

A. Why, yes, the ends would come together. If they would not in one place they would in another.

Q. At the date this accident occurred what coupler was in general and ordinary use on railroads?

A. The automatic coupler.

Q. Did you notice how that draw bar coupler was fastened on the shovel car?

252 A. Yes, sir.

Q. How many draw bar couplings like that did you ever see before this one on cars?

A. On the steam shovel?

Q. On cars or steam shovels or anything else?

A. I never saw any.

Q. How many shovel cars like that did you ever handle in your experience, before this date?

A. I never handled any.

Q. Did you know Adam Schlemmer?

A. Yes, sir.

Q. Do you know whether he ever handled any before?

A. No, sir.

Q. What do you say up to this date as to whether those shovel cars were a usual or unusual thing on the road.

A. An unusual thing.

Q. And that coupling on it: what would you say as to that being a usual or an unusual coupling?

A. Unusual.

Q. What would you say as to its being a difficult coupling, or not, to make with a Trojan coupler?

A. Difficult.

Q. Explain why it would be difficult.

253 A. It is difficult to enter that in that slot—raising that bar and entering it in that slot; and also, putting this pin down, and the box protruding out over the end of the car.

Q. How much would that draw bar weigh?

A. I should judge it would weigh 70 or 80 pounds.

Q. Would that have anything to do with the difficulty in making the coupling?

A. Yes, sir.

Q. From your experience what would you say as to that being safe or an unsafe coupling?

A. Unsafe.

Q. Why?

A. The box protruding out over that car, and the lifting up of that draw bar to enter in this coupling.

Q. Into the slot in the Trojan coupler?

A. Yes, sir.

Q. How was it as to there being any necessity for going between the rails to do it?

A. That is the only way you could get that bar entered in this slot, was to go in between the cars in order to lift it up.

Q. When you went to do that was it necessary to watch where you were putting the end of the draw bar?

A. Yes, sir.

254 Q. Had you to keep looking?

A. Yes, sir.

Q. Did you ever couple any cars?

A. Yes, sir.

Q. Many or few?

A. Many of them.

Q. A hundred?

A. I should judge.

Q. From your experience, and from the conditions existing when Mr. Schlemmer made that coupling, as you have heard from the testimony here—have you listened to the testimony in this case?

A. Not all of it, no, sir.

Q. How much of it: who did you listen to?

A. I heard a part of Mr. Pentz' testimony and Mr. Hoover's.

Q. How as to Mr. Meadows?

A. A part of Mr. Meadow's testimony.

Q. And the gentleman last evening, Mr. Gensamer?

A. I heard all of it last evening.

Q. Now, from the evidence in the case, the testimony that you have heard, and your experience, I want you to state whether there was anything about that that required any instructions to Mr. Schlemmer before he undertook it.

255 Objected to as incompetent, irrelevant and immaterial.

By the COURT: I don't think that is the proper way to put a hypothetical question. The objection is sustained, and the question excluded, in that it is not the proper way to put a hypothetical question.

Q. From your 16 years experience in railroading, taking a coupling like this draw bar coupling, say, to be inserted into an automatic coupling, and in the dusk of an evening, the train having come suddenly to Mr. Schlemmer to make the coupling, thrust upon him, and the bottom of the shovel car overlapping the Trojan coupler so that the ends of the cars would come together and there being no buffers or dead woods on the ends of the shovel car or on the end of the caboose, what would you say as to whether it was necessary for Mr. Schlemmer to have had any instructions about that, if he had not previously been instructed about it?

A. He ought to be.

Mr. M'CAULEY: Objected to as incompetent, irrelevant and immaterial.

256 Objected to because the witness is not shown to be an expert man or competent to give instructions in such cases.

We object to it further because the hypothetical question

is not based on the facts in this case, in that there is no evidence in this case that this train was suddenly thrust upon Mr. Schlemmer, the decedent, in this case, or that it came back suddenly, as the question now stated suggests.

By the COURT: The objection is sustained, and a bill of exceptions is sealed to the plaintiff.

(Court took a recess until 2.00 o'clock, P. M.)

AFTERNOON SESSION—2:00 o'clock p. m.

Mr. CHARLES ALLEN, recalled by the plaintiff; examination resumed by Mr. Truitt.

Q. Where, in the dusk of an evening, an experienced railroad flagman is at a caboose—which is equipped with a Trojan automatic coupler—and a train is backed gently towards the caboose to be coupled to it and the end of the train consists of a shovel car—which is an unusual car—and the coupling on it is a draw-bar
257 coupling—which is, also, an unusual coupling—weighing some 70 or 75 pounds, being some three feet long and the end of the draw bar to be inserted in the Trojan coupling being, possibly, two inches square, and the end of the shovel car is higher—that is the bottom of it—than the usual car, so that it overlaps—goes over—the Trojan automatic coupler on the caboose and permits the ends to come together: should the employee have any instructions or not about that, if he has never approached such a coupling before? From your experience what do you say?

Mr. M'CAULEY: Counsel for the defendant object to the testimony contained in the question, for the following reasons:

First, that the witness on the stand has not qualified as an expert to answer the proposed question.

Second, that the witness on the stand is not the proper party to prove instructions in such case.

Third, the witness having stated that this was an unusual machine or car and that he had never had any experience in making any such coupling, he is wholly incompetent to give an opinion in reference thereto.

Fourth, that the testimony is incompetent, immaterial and irrelevant in this case.

258 By the COURT: The objections are overruled, the testimony admitted, and a bill of exceptions sealed to the defendant.

(WITNESS:)

A. He would need instructions, yes, sir.

Q. Why?

A. On account of the car being as it was built, the shovel being built as it was—the condition that the car existed in, the end protruding out, and this bar having to couple onto the automatic coupler.

Q. What instruction should have been given?

Mr. M'CAULEY: Counsel for the defendant renew the objections made to the prior question.

By the COURT: The objections are overruled, the testimony admitted and a bill of exceptions sealed to the defendant.

(WITNESS:)

A. That the car was in that condition, being dangerous to couple, that was the reason why the instructions should be given.

Q. Can you explain what you mean by "that condition"? What do you mean?

A. Having to couple that car onto this automatic coupler, and the box being on the end there, protruding beyond the car.

259 Q. Going out from the automatic coupler?

A. Yes, sir.

Q. Did I ask you whether it was a usual thing for the ends of cars to come together in that way?

A. I don't think you did.

Q. What would you say about that—whether it was a usual thing?

A. It is not a usual thing.

Q. What is the usual way of coupling a train to a caboose? How is it usually done?

A. If you are backing onto it you back onto it.

Q. Back what? The train, do you mean?

A. Yes, sir.

Q. Back the train to the caboose: is that what you mean?

A. Yes, sir.

Cross-examined by Mr. GORDON:

Q. Where do you reside now?

A. Punxsutawney.

Q. What are you working at?

A. I am a retired railroad man.

Q. Were you discharged recently by this company, the defendant?

A. Yes, sir.

260 Q. You saw a steam shovel at Punxsutawney the day after this accident, did you?

A. Yes, sir.

Q. You were not at Du Bois on the day of the accident?

A. No, sir, I don't think I was. I might have been. I was following my occupation as a railroad man, and I might have been in Du Bois on that day.

Q. You did not see the accident, did you?

A. No, sir.

Q. And you merely know by hearsay that the steam shovel which you saw was the shovel which caused the accident?

A. Yes, sir.

Q. You do not know of your own knowledge?

A. I don't know that was the shovel, no sir.

Q. Did you make the measurements of this shovel?

A. No, sir.

Q. How long a time did you spend in examining the shovel?

A. I just merely walked around it.

Q. You could see, could you, at a glance how it was constructed and how it was equipped with a coupling?

A. Yes, sir.

Q. And ascertain that with a glance as completely and fully as if you had looked at it for a half an hour, couldn't you?

261 A. Yes, sir.

Q. The coupling was merely an ordinary single pocket draw head, with a straight draw-bar attached to it, was it not?

A. On the steam shovel?

Q. Yes, sir, on the shovel.

A. Yes, sir.

Q. It was a very simple arrangement, was it not?

A. It was simple. The only thing in connection with it was the bar and the draw head.

Q. Any brakeman of experience would know how to use it at once, wouldn't he?

A. He would know how to use it.

Q. The only danger in making such a coupling would be if the brakeman, in lifting the free end of the draw-bar, would raise his head too high. Is that correct?

A. No.

Q. If he would keep his head down could he be hurt?

A. Yes, sir.

Q. If he kept his head down could he be hurt?

A. Yes, sir.

Q. How?

A. He might put his hand in there when he was putting that bar in there, and get it hurt.

262 Q. But, I mean could his head get hurt if he kept it down below that shovel?

A. I don't suppose it could.

Q. Then the only instructions in regard to the head would be to keep down—to keep the head down.

A. The only instructions he would need would be to keep his head down to keep from getting his head injured.

Q. And if he had kept his head down it would have been impossible for him to have been injured, would it not, on the head?

A. I don't know. He might have got hurt otherwise.

Q. I mean in the head.

A. He might have got hit in the head without this box coming on him.

Q. How?

A. He might have fallen down and the cars ran over him.

Q. But in order to avoid injury to his head by the cars coming together all that was necessary for him to do was to keep his head down. Is that a fact?

A. If he had kept his head down, more than likely he would not have been injured.

Q. You have seen draw bars used on engines frequently, haven't you?

A. Not recently, no, sir.

Q. Shortly prior to 1900?

A. Yes, sir.

263 Q. And the draw bars were familiar to all brakemen of experience, were they not, on the B. R. & P. road?

A. They were required to. I do not know whether they were or not.

Q. What?

A. They were required to familiarize themselves with them. I don't know whether they were or not.

Q. They were required by the rules of the company to familiarize themselves with the use of draw bars, were they?

A. Yes, sir.

Q. Do you know whether Mr. Schlemmer was a man of experience or not?

A. In that line?

Q. Yes, sir.

A. No, sir.

Q. I mean as a brakeman.

A. As an experienced brakeman?

Q. Yes, sir.

A. Yes, sir.

Q. How long a time did you know him to be in the business of braking?

A. I think about eight years.

Q. Were you in the same crew with him at any time?

— I have worked with him.

264 Q. Was he a careful and competent brakeman?

A. Yes, sir.

Redirect examination by Mr. TRUITT:

Q. Was Mr. Schlemmer an experienced brakeman in the use of this draw-bar coupler?

A. I cannot answer that.

Q. Did you ever see him use one?

A. No, sir.

Q. The draw bar coupling that you are talking about that is used on an engine: the one, now, that you saw on that shovel car—was it the same kind?

A. Something similar. They are used for that purpose.

Q. And they had a curve in them?

A. Some of them did.

Q. And when they had the curve in them what would you call them?

A. Goose-necks.

Q. Did they use the draw bar couplings that you have testified to on the engines? Did they use that to couple—

Objected to as leading.

Q. This draw bar coupling that you testified to on cross-examination as having been used on engines: was that ever used in coupling cars together?

A. Oh, yes.

265 Q. In coupling cars?

A. Yes, sir.

Q. To make up a train?

A. They could use that on the cars; a car being, one higher than another they could use a goose neck on a car.

Q. Take the straight draw bar coupling that was used there on the pilot of the engine that you have been testifying about; did they use those between cars?

A. I never saw it.

Q. Like this one on this shovel car. Did you ever see one used to couple cars together before?

A. No, sir.

Mr. LEE E. MEADOWS, recalled by the plaintiff; examined by Mr. Truitt:

Q. The night that this accident took place what became of that shovel car?

A. We moved it from Du Bois to Punxsutawney.

Q. Where did you leave it?

A. I don't remember what track we left it on that night.

266 Q. Where did you leave it?

A. We left it in Punxsutawney, some place there in the yard.

Q. In the yard near what station or place?

A. We used to often back our train into Elk Run up there, and sometimes we would back down to the South yard. I don't remember whether we backed that train into the North yard that night or whether we took it down below—in the South yard, we call it.

Q. You left it in the Punxsutawney yard, did you?

A. Yes, sir.

Q. Do you know whether there was any other shovel car in there or not?

A. I didn't see any other.

Q. Do you know how long it stayed there?

A. No, sir. It was there the next day.

Q. Did it have this same coupling on then, yet; when you took it down did it have this coupling on?

A. Yes, sir.

Q. Did you leave it with it on?

A. Yes, sir.

Q. Was it on there the next day?

A. I could not tell you whether it was on there the next day.

267 Mr. DORSEY E. GENSAMER, recalled by the plaintiff; examined by Mr. Truitt:

Q. After that accident took place what became of that shovel car?

A. We took it to Punxsutawney.

Q. When?

A. That same evening.

Q. Where did you leave it?

A. I don't remember just what part of the yard, but we took it to Punxsutawney.

Q. Did you leave it in the Punxsutawney yards.

A. Yes, sir, in the Punxsutawney yards.

Q. That night?

A. Yes, sir.

Q. And how long did it stay there? Was it there the next day?

A. I could not say.

Q. Did you see it there?

A. I didn't see it.

Q. Do you know whether there was any other shovel car there?

A. I don't know.

268 Mr. CHARLES ALLEN, recalled by the plaintiff; examined by Mr. Truitt:

Q. When you saw this shovel car with that coupling on the day after this accident where did you see it?

A. On the freight house track in Punxsutawney.

Q. In the Punxsutawney yard?

A. Yes, sir.

Q. Was there any other car of that nature there?

A. No, sir.

Mr. A. W. PENTZ, recalled by the plaintiff; examined by Mr. Truitt:

Q. You testified you saw this car the next day after the accident. Where did you see it?

A. In the Punxsutawney South yard, on the freight-house track.

Q. Where Mr. Allen says he saw it?

A. Yes, sir, the same place.

Q. Did you see any other shovel car there the same day?

A. No, sir.

Cross-examined by Mr. Gordon:

269 Q. Did you go down purposely to see it the next day?
A. Yes, sir.

Q. Who sent you down?

A. No one sent me down. We heard about Mr. Schlemmer being killed the night before, and we were called out the next morning; and we heard that the car that killed him was in the South yard, in the freight house track, and that was just a short distance—probably six or eight car lengths—from where we got our train; and it was only natural that we went there to see it.

Q. Then you simply went from your train to the yard to see it?

A. Yes, sir.

Q. You did not go from Dubois to Punxsutawney to see it?

A. No, sir.

Mr. ISAAC HOOVER, recalled by the plaintiff; examined by Mr. Truitt:

Q. Are you acquainted with Christina Fascett?

A. Yes, sir.

Q. Do you know whether she was a witness on the other trial here, the first trial?

A. She was, yes, sir.

Q. Do you know where she is now?

270 A. I don't.

Q. Where did she live?

A. The last I knew of her: she lived in Du Bois at that time.

Q. Have you inquired about her?

A. I have. I have asked different people if they knew where she was, but nobody appeared to know.

Q. You tried to find her, did you?

A. I inquired about her, yes, sir.

Q. Were you able to find her or learn where she went?

A. I was not, no, sir.

Cross-examined by Mr. GORDON:

Q. By whose request did you make these inquiries?

A. Of all the people who were acquainted with her around there.

Q. Who asked you to make these inquiries?

A. Nobody at all.

Q. You simply did it of your own accord?

A. I simply asked my brother if she had been gone a couple of years, and he said he didn't know anything about where she was. I was not instructed to ask any one at all.

Q. Did you ask anybody else but your brother?

A. Yes, sir, Mr. Smith, a store-keeper, and Mr. Silliman, in Du Bois.

Q. Any other person?

A. Not that I remember, exactly.

271 Mr. TRUITT: I do not want to be sworn in the case, but I will state that I tried to learn where Mrs. Fascett was, and I could not. We now offer in evidence the testimony of Mrs. Fascett taken on the first trial of this case.

Mr. M'CAULEY: We object to the offer, for the following reasons

First, that there is no proof of any endeavor on the part of the plaintiff in this case to ascertain the whereabouts of the witness. The testimony of Mr. Hoover was to the effect that the inquiry was made solely for himself, and not on behalf of the plaintiff. He merely asked his brother and Mr. Smith where this party was, and he in no way connects the plaintiff with the effort to obtain the witness.

Second, that there is no proof that the witness is out of the jurisdiction of this Court.

Third, there is no proof that she is dead.

By the COURT: It seems to me that the evidence is very meagre as to any efforts to find this witness.

272 Mr. TRUITT: We proved by Mr. Cochren, this forenoon, that he tried to find her and didn't know where she was. I will say that I saw Mr. Lee Meadows, and Mr. Pentz, and Mr. Gensamer, and I instructed them to hunt Mrs. Fascett for me—that I understood she was in Dubois. And I am well acquainted in Jefferson county, and the woman is not in this county, I am

positive. I do not think she is here, at least. I was informed that she had left Dubois and they could not find her. And I believe they were talking with these men here, Mr. Hoover and Mr. Cochran, and they could not find her; and none of us have been able to find her. I have been exceedingly anxious to subpoena the woman, had her on the subpoena and tried to find her; and I state that I could not find her.

By the COURT: You have not called one of these men whom you instructed, to prove what efforts he made.

Mr. A. W. PENTZ, recalled by the plaintiff: examined by Mr. TRUITT:

Q. I want you to state whether you remember my having a conversation with you about Mrs. Fascett.

A. Yes, sir.

273 Q. And about my requesting you to hunt her, to find out where she was.

A. Yes, sir. You asked me if I knew where Mrs. Fascett was, and I told you that I didn't know; that she had left Dubois and afterwards lived in Bradford, but she left Bradford and I didn't know where she was.

Q. Did you inquire about the woman?

A. Yes; I inquired of her brother, and of other parties in Dubois that had known her: and they didn't know where she was.

Q. About when was that?

A. About three weeks ago.

Q. And had her own brother said he didn't know where she was?

A. Yes, sir.

Q. And the other parties: they said they did not know?

A. Yes, sir.

Cross-examined by Mr. GORDON:

Q. What did you ask her brother and what did he reply?

A. I just asked him where his sister was and he said he didn't know, that she had left Bradford. She had moved from Dubois to Bradford, and he said he didn't know where she had gone from there.

Q. Did you make any inquiries in Bradford?

274 A. No, sir, I have not been in Bradford at all.

Q. Were you informed that she was living with her daughter in Bradford?

A. No, sir.

By the COURT:

Q. I understood you to say he told you she had left Bradford?

A. Yes, sir; he told me she had left Bradford, but he did not know where she had gone to.

Q. You were searching for her residence at Mr. Truitt's request, were you?

A. Yes, sir.

Q. Did Mr. Truitt tell you that he wanted her as a witness in this case?

A. I don't remember whether he told me that he wanted her as a witness in this case. He just said he wanted her. He asked me if I knew her, and I said I had known her when she was in Dubois.

Q. You knew that she was wanted as a witness in the case, did you?

A. Not particularly, no sir.

Q. You knew she was a witness before in the case?

A. I was not here. No, sir, I was not at the trial before.

275 Redirect examination by Mr. TRUITT:

Q. Our conversation took place in connection with my talk to you about the witnesses in the case, didn't it: that was the only reason you talked to be about it, wasn't it?

A. Yes, sir, that is the only reason, I suppose, that you had to talk to me about it.

Mr. TRUITT: We offer in evidence the testimony of Mrs. Christina Fascett, taken on the former trial.

By the COURT: The objection is overruled, the testimony admitted, and a bill of exceptions sealed to the defendant.

(Mr. Truitt reads to the jury the testimony of Mrs. Cristina Fascett, taken on the 25th of April, 1902, on the former trial of this case, as follows):

"Mrs. CRISTINA FASCETT, called as a witness on the part of the plaintiff, sworn; direct examination conducted by Mr. Truitt.

Q. Mrs. Fascett, where did you live on the 5th of August, 1900?

276 A. I was living right at Brady street, right at the railroad crossing.

Q. In what town?

A. Dubois.

Q. Are you engaged in business there?

A. I have a little store, yes, sir.

Q. Will you tell the court and jury what you know of this accident, what you saw, or heard and saw?

A. Yes, sir. I saw the train standing out there, and I went back in and served some cream; and while I was in I heard some cars come together, and an unnatural bump, as I thought and I went to the door and went clear out onto the road; and when I got out there the caboose and this steam shovel just gave way, and I saw a man fall. And then I went back into the house and said to this gentleman who was eating cream that there was a man killed. And I went out again, and when I went out the second time I went clear to the track, and there was a brakeman or one of the men sitting on his knees, had him, and the blood just rushing from his head.

Q. Now, Mrs. Fascett, what time in the day was this?

A. As near as I could say, about 9 o'clock is what I think it was.

Q. Do you know whether the man who was killed had a lantern or not?

A. Well, I didn't see his lantern lit, but I saw his lantern laying on the track after the caboose pulled away.

Q. Where was it?

A. Where was the lantern?

Q. Yes.

A. Right in the middle of the track. They picked it up.

Q. It was not light then?

A. No, sir.

Q. Did you hear any conversation among those railroad men about the accident at that time?"

Mr. GORDON: That answer was excluded before. We object to that as hearsay and incompetent.

By the COURT: I think it is. You may omit the answer to that.

Q. Did you know any of the crew of this train?

A. No, sir, I do not think I was acquainted with any of them at that time. Oh, Mr. Neilson, yes, sir—the conductor. I knew Mr Neilson.

Q. Was Neilson present?

A. Yes, sir, he was.

Q. Well, did you hear him say anything?

A. No, sir, I did not.

Q. And do you know whether any of the men were talking to him, of this crew?

A. No; no.

Cross-examined by Mr. GORDON:

Q. You spoke, Mrs. Fascett, of seeing—I think you used the expression the shovel car and the caboose fall apart. That is, you meant you saw them draw away from each other?

A. Yes, sir; when I got out as far as the road they just gave way, and then I saw the man drop.

Q. That was the slack of the train being taken up?

A. Oh, no; it was when the bump of the train let loose again, and then he fell.

Q. After it had come together?

A. Yes, sir.

Q. A foot or two or more?

A. I could not tell you. I went back again into the house."

Mr. TRUITT: We offer in evidence an almanack of the year 1900, showing that the sun set on August 5, 1900 at 6 o'clock. and 51 minutes.

279 Mr. T. D. COLLIER, called as a witness by plaintiff, sworn; examined by Mr. Truitt.

Q. I have subpoenaed you here. What is your occupation?

A. A freight conductor.

Q. On what road?

A. The B. R. & P.

Q. The defendant in this case?

A. The defendant in this case.

Q. How long have you railroaded?

A. 15 years.

Q. In that time did you ever couple any cars?

A. Lots of them.

Q. A hundred?

A. I suppose. Maybe more.

Q. The date of this accident, August 5, 1900, what kind of couplings were in general use on railroads?

A. Automatic.

Q. Have you heard the testimony and evidence of the witnesses in this case?

A. I have heard most of it.

Q. How as to this draw bar coupling being a usual or an unusual coupling for coupling cars together?

A. It was an unusual coupling.

Q. How as to a shovel car being a usual or unusual thing on the railroad?

A. A shovel car, as it has been described here, was an unusual car, the way it was constructed.

Q. Take an experienced railroad flagman, in the dusk of an evening, at a caboose equipped with a Trojan automatic coupler, and a train backed towards the caboose to be coupled to it, the end of the train being a shovel car and having on it a draw bar coupling weighing some 70 or 75 pounds, to be inserted in the slot in the Trojan automatic coupler to couple it with, and the bottom of the shovel car being several inches higher than an ordinary car—up off the track—so that it would pass over the automatic coupler on the caboose: what would you say as to whether that flagman should have had any instructions about making the coupling or not?

Mr. M'CAULEY: Objected to for the counsel for the defendant, for the following reasons:

First, that the witness on the stand has not qualified as an expert to answer the proposed question.

Second, that the witness on the stand is not the proper party to prove instructions in such case.

281 Third, the witness having stated that this was an unusual machine or car and that he had never had any experience in making any such coupling, he is wholly incompetent to give an opinion in reference thereto.

Fourth, that the testimony is incompetent, immaterial and irrelevant in this case.

Fifth, that the proposed offer does not cover a subject which requires the testimony of an expert witness.

By the COURT: The objections are overruled, the testimony admitted, and a bill of exceptions is sealed to the defendant.

Q. (Question read.)

A. He should.

Q. What instructions should he have had?

A. He should have been notified that it was a dangerous coupling. That is, the body of the shovel car went over the draw bar, and if he missed the coupling there was nothing there to protect him, if his body or head should have got up between the end sill of the car and the end of the shovel car.

Q. Was it a usual or unusual thing for the ends of cars to come together in that way?

A. I never saw one.

282 Q. What is the usual way of coupling to a caboose?

A. Backing a train.

Q. The evidence here shows that the men afterwards pushed the caboose up to the shovel-car and made the coupling safer. Was that a usual thing to do?

A. No, it was not a usual thing to do.

Q. Have you ever seen that done—where men pushed the caboose up to the train?

A. Yes, sir, I have.

Q. How often?

A. Not very often. Take an instance on a grade, where you could not back your train, I have seen cabooses pushed on or dropped on.

Q. Pushed and coupled to a draw bar coupling; did you ever see that done?

A. No, I never saw it done.

Cross-examined by Mr. GORDON:

Q. Prior to August, 1900, had not you frequently seen draw bars

A. I have seen draw bars.

Q. You have used them, have you not?

A. I have used them, before and since.

Q. All brakemen of experience were more or less familiar with draw-bars, were they not?

283 A. I suppose they were.

Q. You say that if this man Schlemmer had been warned to keep down under the body of that shovel car and told if he raised his head he was liable to have it crushed—would that have been proper instruction?

A. Yes, I think that would somewhere cover it. If he was instructed that shovel car was no protection to him, that it would come over the drawhead and hit him.

Q. I believe you did not say that you saw this accident at all?

A. No, sir, I never saw the car.

Q. Nor the steam shovel.

A. No, I never saw the steam shovel.

Redirect examination by Mr. TRUITT:

Q. Draw bars that you testify as having seen used: do you mean the kind of a draw bar coupling that was on this steam shovel?

A. Not such a heavy one.

By Mr. M'CAULEY:

Q. Did you say "yes"?

A. Not so heavy as the testimony.

By Mr. TRUITT:

284 Q. Did they use the kind that you testified to having seen used in coupling cars together or coupling engines and cars?

A. They mostly used them for coupling engines or coupling an engine to anything where the pilot would not allow a link to reach.

Q. Then they were used on engines—the draw bar coupling?

A. On engines, principally.

Q. Not to couple ordinary cars?

A. Not to couple ordinary cars.

Recross-examined by Mr. GORDON:

Q. How about wrecking derricks?

A. Yes, sir, they carry them on wrecking derricks at the present day—on wrecking outfits.

Q. All kinds of derricks?

A. On all wrecking outfits they always carry them.

Q. Brakemen are familiar with their use there, are they not?

A. Yes, sir.

Q. They still continue to use them on machines of that kind?

A. In cases of wrecks.

Q. A steam shovel is constructed on something the same plan as a wrecking derrick, isn't it?

A. Not exactly.

Q. Isn't it something the same general plan?

A. It is machinery.

285 Q. With a beam reaching out and the engine and other machinery on trucks?

A. On the car: on the bed of the car.

Q. And isn't that the way a steam shovel is constructed?

A. Yes, sir.

Q. The trucks and all are a part of the steam shovel, are they not?

A. There are two trucks under there similar to any other car—four-wheeled trucks.

Q. Isn't it part of the machinery, though, the trucks as well as the other machinery?

A. Part of the car.

Q. You talk of this being a car. Isn't it simply a steam shovel?

A. A steam shovel?

Q. Yes, sir.

A. Yes, sir, it is a steam shovel.

Mr. TRUITT: We have a rule for the defendants to produce their books and papers showing where they got this car, where they were transporting it from and where they were taking it to. We would like to have the books and papers produced or the admission of those facts by the counsel.

286 Mr. GORDON: We find that all books and bills showing where this car was taken from and where it was going to have been destroyed some years ago, and we have no books or papers showing the facts which you desire to prove by them.

These books and bills, showing where cars come from and their destination, are burned every three, four, or five years.

We may say that Mr. Casey, the engineer in charge of the shovel, is here, present in the court room; and no doubt he can tell you where the shovel car came from and where it was going to.

Mr. JAMES CASEY, called as a witness by the plaintiff, sworn; examined by Mr. Truitt.

Q. On August 5, 1900, did you know anything about this shovel car that we have been talking about in this suit?

A. I do, sir.

Q. Where did that shovel car come from?

A. From Limestone, New York.

287 Mr. M'CAULEY: We object to the testimony as to where this car came from as incompetent, irrelevant and immaterial.

By the COURT: The objection is overruled, the testimony admitted, and a bill of exceptions is sealed to the defendant.

Q. Where did this car come from?

A. Limestone, New York.

Q. When did it leave Limestone?

A. On Saturday, the day before.

Q. That would be August 4th, would it?

A. Yes, sir.

Q. 1900?

A. Yes, sir.

Q. What county in New York is this?

A. Cataraugus county.

Q. Where was it being taken to?

A. Glenshaw, Pa.

Q. Near what town?

A. Eight miles from Pittsburgh.

Q. In Pennsylvania?

A. Yes, sir.

Q. How far from Butler, in Pennsylvania, is Glenshaw?

288 A. About 22 miles.

Q. Were you with the car when it left?

A. I was.

Q. What railroad did it go over?

A. The B. R. & P.

Q. The Buffalo, Rochester & Pittsburgh Railroad?

A. Yes, sir.

Q. The defendant in this case?

A. Yes, sir.

Q. They were hauling it?

A. Yes, sir.

Q. And what time in the day did you leave on the 4th?

A. Some time in the afternoon: about half past three, I would judge.

Q. And when did you get to Du Bois?

A. Sunday night sometime, or Monday morning.

Q. You got there Sunday, did you?

- A. Sunday night some time.
 Q. Then where was the car taken to from Du Bois?
 A. To Butler.
 Q. When?
 A. Monday.
 Q. Did it stop between Du Bois and Butler?
 A. It might stop on the siding to let another train by.
 Q. How as to stopping in the Punxsutawney yard?
 289 A. Oh, yes, it stopped in the Punxsutawney yard.
 Q. Were you in Punxsutawney with it?
 A. Yes, sir.
 Q. How long were you there?
 A. Until Monday morning.
 Q. What time of day Monday did you leave it—do you know?
 A. I could not say.
 Q. You don't know whether it could have been Tuesday morning?
 A. Oh, no, it was the next day.

Cross-examined by Mr. GORDON:

- Q. To whom did this steam shovel belong?
 A. T. F. Ryan, contractor.
 Q. What was this, a car or a steam shovel?
 A. It was a steam shovel.
 Q. Was there any room in it for passengers or any merchandise
 of any kind?
 A. No, sir.
 Q. For what was it used?
 A. For excavating.
 Q. Was it possible to use it for any other purpose?
 A. No, not except loading timber onto something else.
 Q. It was used as a derrick?
 290 A. A derrick, like, yes, sir.
 Q. Was it inspected at Dubois?
 A. At Bradford.
 Q. What was done to it at Bradford?
 A. It was inspected, and a new pair of trucks put under it. That
 kept us over until Sunday afternoon.
 Q. Was it thoroughly gone over?
 A. Yes, sir.
 Q. In good condition?
 A. In good condition, in every way.
 Q. How long had you had charge of this steam shovel?
 A. Previous to that?
 Q. Yes, sir.
 A. I worked around it for about two years.
 Q. You were perfectly familiar with it?
 A. Yes, sir.
 Q. What kind of a coupling had it?
 A. It had a draw bar inserted in one of those—what I used to call
 bull noses.
 Q. You may state whether or not that was the usual kind of
 coupler for steam shovels?

A. At that time it was.

Q. Were you present at the time of this accident?

A. I was.

291 Objected to as not cross-examination.

By the COURT: The objection is sustained.

Mr. GORDON: The plaintiff followed the car from Limestone to Butler and asked about its stops. We have a right to show whether it stopped at any other place and why it stopped.

By the COURT: The plaintiff called the witness to prove the destination of the shovel car. I don't think you can examine him as to any other matter. He did not state anything except where they stopped with the car along the route.

Mr. M'CAULEY: We have a right to ask whether the car stopped at any other place.

By the COURT: You may ask him how many places or all the places it stopped, if you want to.

Q. What time did you reach Dubois, Mr. Casey?

A. As near as I can judge it was about 8:10 or 8:15.

Q. And how long did you remain there?

A. About 40 minutes.

292 Q. Then when did you leave?

A. Indeed I don't know.

Q. You went from there to Punxsutawney did you?

A. Yes, sir.

Mrs. CATHERINE CRAIG, the plaintiff, called on her own behalf, sworn; examined by Mr. Truitt.

Q. You are the plaintiff in this action, are you?

A. Yes, sir.

Q. You brought the suit for yourself and your two children?

A. Yes, sir.

Q. When was your name changed from Schlemmer?

A. When was it changed?

Q. Yes. When did you get married to Mr. Craig?

A. About three years ago.

Q. Can you give us the exact date when you were married to Mr. Craig.

A. On August 17th.

Q. Was it three years ago last August?

A. I think it was on the 25th of September.

Q. Three years ago last September?

A. Yes, sir.

293 Q. In 1904?

A. Yes, sir.

Q. September 25, 1904?

A. Yes, sir.

Q. What is your husband's first name?

A. Patrick.

Q. What was your maiden name?

A. Catherine Sprow.

Q. A daughter of whom?

A. Peelor Sprow.

Q. Where did your father's folks live?

A. In Bell township.

Q. This county?

A. Yes, sir.

Q. Were you ever married to Adam Schlemmer?

A. Yes, sir.

Q. When?

A. On November 6th.

Q. What year?

A. I cannot remember that.

Q. How many years before he was killed?

A. Three years.

294 Q. Would it have been three years or four if he had lived until the next November?

A. Four years.

Q. You would have been married four years if he had lived until the 6th of November after he was killed?

A. Yes, sir. Do you mean when I was first married?

Q. Yes, to Adam Schlemmer. He was killed on August 5, 1900. How many years before that were you married to Adam Schlemmer?

A. We were married almost 11 years.

Q. You and Adam Schlemmer?

A. Yes, sir.

Q. Did you ever have any children?

A. Yes, sir.

Mr. M'CAULEY: We would like to know what the counsel proposes to prove?

Mr. TRUITT: That she is the widow of Adam Schlemmer.

Mr. M'CAULEY: She is not, though.

Mr. TRUITT: We propose to show that when we brought this suit this woman was the widow of Adam Schlemmer, and that she 295 had two children to him, and that the suit was brought for herself and children; and also to prove the names and ages of the children: that he was killed, and that he was her husband. This for the purpose of showing that she was his widow when she brought this suit and had a right under the law to bring it.

Mr. M'CAULEY: We object to the offer of the testimony, and for the purposes stated, for the following reasons:

First, that the witness on the stand, having testified that she married Patrick Craig on September 25, 1904, that she then ceased to be the widow of Adam Schlemmer deceased, within the meaning of the Act of April, 1855, under which this suit was brought, and then became the wife of Patrick Craig: and that any evidence in this suit is therefore wholly irrelevant, immaterial and incompetent and will not justify a recovery by Catherine Craig.

Second, that the marriage by Catherine Schlemmer to Patrick Craig, on September 25, 1904, divested her of all right to recover damages on account of the death of Adam Schlemmer in this action.

By the COURT: For the present the objection is overruled. 296 the testimony admitted, and a bill of exceptions is sealed to the defendant.

The questions raised by these objections may be raised at the conclusion of the case and discussed then.

Q. Did you and Mr. Schlemmer have any children?

A. We had two.

Q. At the time of his death how old were those children?

A. Two and three years.

Q. What was the name of the one that was two years old?

A. Charles Chauncey.

Q. Charles Chauncey Schlemmer?

A. Yes, sir.

Q. And what was the name of the one that was three years old?

A. Edwin Earl Schlemmer?

Q. Are they living yet?

A. Yes, sir.

Q. Where are they?

A. Right there (pointing them out).

Q. Sitting here beside me, are they?

A. Yes, sir.

Q. Do you remember when Mr. Schlemmer was killed?

A. Yes, sir, on August 5th.

Q. Where was he buried?

297 A. In the Graffius cemetery.

Q. In what township?

A. In Bell township.

Q. In this county?

A. Yes, sir.

Q. What was Mr. Schlemmer's occupation?

A. Railroading.

Q. How long had he railroaded before his death?

A. I cannot just recollect. I don't know how many years he rail-roaded.

Q. All the 10 or 11 years you were married?

A. Yes, sir.

Q. What company was he working for when he was killed?

A. The B. R. & P.

Q. The defendant in this case?

A. Yes, sir.

Q. What kind of wages was he getting?

A. From \$60 to \$75 and \$80 a month.

Q. How was it as to his being an industrious man,—working steady?

A. He always was industrious.

Q. How was it as to his being a healthy man?

A. He always was healthy.

298 Q. How old was Mr. Schlemmer at the time he was killed?

A. 31 years.

Q. Where were you living then?

A. Punxsutawney.

Q. In this county?

A. Yes, sir.

Cross-examined by Mr. GORDON :

Q. You and your husband, Patrick Craig, are living together as husband and wife, are you?

A. Yes, sir.

Q. In Brockwayville, this county?

A. Yes, sir.

Q. And have lived together as husband and wife continuously since your marriage?

A. Yes, sir.

Q. Mr. Craig is here in court, is he?

A. No, sir.

Q. Are your two boys living with you?

A. Yes, sir.

Q. You have a third child since your marriage with Mr. Craig, have you?

A. Yes, sir.

Q. How old is that child?

A. Three years.

299 Mr. WILLIAM SPROW, called as a witness by the plaintiff, sworn; examined by Mr. Truitt.

Q. Where do you reside, Mr. Sprow?

A. Bell township, Jefferson county.

Q. How long have you resided there?

A. All my life.

Q. What relation is Mrs. Catherine Schlemmer, now Craig, to you?

A. She is my sister.

Q. Did you know her husband, Adam Schlemmer?

A. I did.

Q. What do you know as to his being a healthy man?

A. I never knew him to *lost* but three days' work. I think, on account of sickness.

Q. What as to his being a steady workingman?

A. He was a steady workingman. He worked almost day and night—while he worked for the B. R. & P. Company, especially.

Q. Did you go there frequently, to their residence?

A. Yes, sir, I was there every week.

Q. Where were they living then?

A. They were living at Punxsutawney, in this county.

Q. Do you know where he was working at the time he got killed—who he was working for?

A. Yes, sir.

Q. Who?

A. The B. R. & P. Company.

300 Q. The defendant in this case?

A. Yes, sir.

Q. Had he any children?

A. Two.

Q. Are these his children—sitting here?

A. They are.

Q. Is your sister here his widow?

Objected to as asking for the opinion of the witness.

By the COURT: We have the facts. His opinion would not add anything.

J. A. SCOTT, Esq., called as a witness by the plaintiff, sworn; examined by Mr. Truitt.

Q. You are a member of the bar here, are you?

A. Yes, sir.

Q. Have you also had any experience in the life insurance business?

A. Yes, sir.

Q. Have you had any knowledge as to the life tables, as
301 they call them?

A. Oh, yes, some. I have examined the experience tables frequently.

Q. Have you them with you?

A. I have one with me.

Q. What do you call them?

A. This is the American Experience Table of Mortality.

Q. What is the expectancy of life of a person 31 years of age, Mr. Scott?

A. 34 64/100 years.

Cross-examined by Mr. GORDON:

Q. They do not always hold out, do they, Mr. Scott?

A. I don't know. They generally come pretty close to it.

Mr. TRUITT: We offer in evidence the American Experience Table of Mortality for 31 years.

Mr. TRUITT: The plaintiff offers especially in this case, in evidence, the statute of the United States relating to safety couplers, which was
302 approved March 2, 1893 by the fifty-second Congress, second section, chapter 196, and which appears in the United States Revised Statutes or Statutes at Large in Volume 27, page 534.

We call especial attention to sections 2 and 8 of this statute.

Mr. M'CAULEY: Objected to as incompetent, irrelevant and immaterial.

Second, because under the pleadings in this case there is no reference whatever to the act of Congress until long after the statute of limitations had run against the plaintiff. We therefore say that the offering now of a statute of that nature as a part of the pleadings would deprive the defendant of the benefit which it was entitled to.

By the COURT: The objection is overruled, the testimony admitted, and a bill of exceptions is sealed to the defendant.

The plaintiff rests.

303 Mr. HARRY C. NEILSON, called as a witness by the defendant sworn; examined by Mr. Gordon.

Q. Where do you reside?

A. Jefferson County, Alabama.

Q. You are not in the employ of the B. R. & P. Company now?

A. No, sir.

Q. You have not been for some years?

A. Not for five years.

Q. Were you the conductor in charge of this train in the Dubois yards of the evening of August 5, 1900?

A. I was.

Q. Just state what occurred there?

A. We had arrived at Dubois—we had—about noon. We were held there for this contractor's outfit, which arrived there about 8 o'clock. In the train which arrived there were a few cars which we did not get which the switch engine threw out. Then we came up the main track with our engine and caboose—on the south bound main—and cut the caboose off at Brady street, and went in over the cross over or track No. 1 and coupled onto this train of 17 cars and steam shovel,—the steam shovel being on the rear end of the cut; pulled out over the cross over and backed down to within about four or five feet of the caboose and stopped. In the meantime, Mr. Schlemmer was

304 standing there by the caboose. He had been in the caboose.

When we stopped there he came, and he said "I will enter this draw bar, and you drop the pin." I said, "No, I will set the pin: it will drop itself." And so he got in between the cars—

Q. Prior to that did you talk to him anything about how to make the coupling?

A. Yes, sir.

Q. What did you say?

A. I told Mr. Schlemmer—I said, "Mr. Schlemmer, you be very careful now and keep your head down low so as not to get mashed in between those cars." He said he would. And he caught hold of the crab-iron underneath the caboose—got down underneath that—and took hold of the draw bar to enter it into the automatic coupler. I stepped back where I could see the rest of the men and the engine, and gave a signal to come back very slow, which it did. It just barely came up against the caboose. And while Mr. Schlemmer was raising this draw bar with his hand, he raised his body and permitted the top part of his head to come between this false work of the steam shovel and the end of the caboose, and was crushed.

Q. Had he obeyed your instructions to keep down could the accident have occurred?

305 A. No, sir.

Q. Was the caboose moved at all by the train coming back?

A. No, sir.

Q. What did you do with Mr. Schlemmer after he was killed?

A. I pulled him out from between the tracks—between the cars—and got some gentlemen—I believe—that were there to take care of him until I would go to the telegraph office and call the physicians; and then we put him in the caboose and carried him down to the passenger station, where he got the aid of a couple of Doctors (I forget their names at the present time); and then we carried him down to the Y. M. C. A. where he was taken out of the caboose and left at the Y. M. C. A.

Q. Was the caboose afterwards coupled to the steam shovel?

A. Yes.

Q. Who made the coupling?

A. I did.

Q. State how you did it?

A. The yard engine had hold of this caboose, and we went right up close to the steam shovel; and I got underneath and made the coupling in the same way that Mr. Schlemmer attempted to couple it.

Q. Did you have any trouble in making it, Mr. Neilson?

306 A. No, sir.

Q. Was Mr. Schlemmer a brakeman of experience?

A. He had been working with me for two or three years; and I understand he had had 8 or 10 years' experience.

Q. Was there anything complicated about this coupler?

A. No, sir. It was very plain. It was a draw bar, only a very plain piece of iron with a hole in each end for a pin.

Q. What other instructions, if any, should have been given him?

A. I don't consider that any other instructions ought to have been necessary to give him.

Q. What time did you leave the Dubois yard for Punxsutawney?

A. About 8:55.

Q. And at what time was Mr. Schlemmer killed?

A. Somewhere between 8 and 9.

Q. Was it daylight yet?

A. It was between dusk and dark. It was not—you could not say—dark, but it was not broad day light.

Q. Could you see the coupling apparatus and the cars, and so on, without the aid of lamp light?

A. Yes, sir.

Q. Did you have any trouble when you made the coupling, yourself, in seeing?

A. No, sir.

Q. Was there anything about this apparatus—the steam
307 shovel or coupling—which required explanation to a brakeman of experience?

A. No, sir, not with a brakeman having five or six years' experience—it should not be necessary.

Q. Were draw bars used frequently prior to this time?

A. Previous to this I have seen a good many draw bars on the front of engines, pilots, and so forth, where they had been used before the automatic coupler was established.

Q. Who else were present at the time of the happening of this accident?

A. I could not swear that any one was present, with the exception of Mr. Schlemmer and Mr. Casey. I understand Mr. Coates was right there, but I don't remember of seeing him at the time.

Q. Mr. Casey you know was present?

A. Yes, sir, he was sitting on the caboose, or right by the side of it—I forget which at the present time.

Cross-examined by Mr. TRUITT:

Q. You and Mr. Schlemmer were at the caboose?

A. Yes, sir.

Q. And this shovel car was backed up there by the engine to be coupled to the caboose?

A. Yes, sir.

Q. It was on the end of the train?

308 A. Yes, sir.

Q. How many shovel cars had Adam Schlemmer ever coupled before?

A. I could not say.

Q. Did you ever see him couple one before?

A. No, sir.

Q. During the two or three years that he was with you did you ever see him make a coupling of a shovel car?

A. No, sir.

Q. Wasn't that a draw bar coupling on the shovel car?

A. Yes, sir, a plain draw bar.

Q. How many couplings just like that did Adam Schlemmer ever see before that evening?

A. I could not say that.

Q. Do you know that he ever saw one during the two or three years that you were with him?

A. No, sir, I could not say that he did.

Q. The shovel car was several inches higher up from the track than the caboose, wasn't it?

A. The false work of the shovel car.

Q. The bottom of it?

A. No, sir, the false work of the car is built around the machinery to protect it from the weather, and so forth.

Q. The end of it: wasn't the end up a good deal higher—
309 the bottom of the end—than the bottom of the end of the caboose?

A. You mean was the draw head in the shovel higher than the one on the caboose?

Q. No, sir. I am talking about the end of the shovel car and the end of the caboose—the bottom.

A. The false work was higher than the end of the caboose, yes, sir.

Q. It was about 8 or 10 inches higher, wasn't it?

A. I could not say just the height, but it was high.

Q. It was that much higher that when they came together it would go over the coupling on the caboose?

A. Yes, sir.

Q. And it did go over, didn't it?

A. Yes, sir.

Q. And the end of the shovel car went against the splash boards or end of the caboose?

A. Yes, sir.

Q. And Mr. Schlemmer's head was out at the splash board and caught?

A. It caught between the splash board and the false work of the shovel, yes, sir.

Q. Wasn't it the side of his head that was next the shovel car that was crushed?

A. I did not examine his head close. I was in a hurry
310 to get physicians. I didn't examine his head at all.

Q. It was the top of his head that was crushed?

A. The top of his head, yes, sir; the upper part.

Q. And you had told him to keep down?

A. Yes, sir.

Q. He was obeying you, wasn't he?

A. I suppose he was trying to keep down. At the same time he raised up. If he had kept down it would not have happened.

Q. What raised him up?

A. He raised his body when he was raising the bar.

Q. Didn't he have to raise his body when he was raising that heavy iron bar?

A. Not necessarily.

Q. Could he have raised up without turning his head?

A. He could have raised his arm without raising his head.

Q. Had he to watch the hole in the automatic coupler that he was putting the draw bar in?

A. Certainly. A man watches what he is doing when he is working around the railroad.

Q. He had to watch that hole to see where to put it, didn't he, the draw bar?

A. Yes, sir.

Q. While he was watching that could he be watching
311 back of him and up above him?

A. It was not necessary to be watching up above him.

Q. That was not necessary?

A. No, sir.

Q. Didn't he have to keep his head up when he had hold of that draw-bar in order to see that hole in that automatic coupling?

A. He would naturally hold his head up to a certain extent, but not necessarily hold it up high enough to get it crushed.

Q. How could he gage just how high to hold his head there that evening?

A. How could he gage?

Q. Yes, sir.

A. If he would stay back under this shovel car this part that projected—there would have been no chance for him to get caught.

Q. His head may have jolted in there, may it not, from all you know?

A. I don't see what would jolt him.

Q. Wasn't the train, with the shovel car, coming back?

A. Barely moving along.

Q. It was moving, wasn't it?

A. Yes, sir.

Q. He had to watch that train, hadn't he?

A. Not necessarily to watch the train?

312 Q. He didn't have to pay any attention to the moving train?

A. He had to watch that bar and enter it in this slot.

Q. Didn't the end of the draw bar coupling, when he attempted the making of it, strike the automatic coupling?

A. I naturally suppose it did.

Q. And it missed, didn't it?

A. I could not say. He didn't make the coupling, no, sir. The coupling was not made.

Q. Then it did miss?

A. It didn't miss the draw bar but he failed to make the coupling.

Q. When did he put his head up—before it missed or after it missed?

A. It was before it missed; in raising this bar up.

Q. Now, he put his head up before it missed, didn't he?

A. Yes, sir.

Q. And before it missed there were no dangers there at all, were there?

A. Sir?

Q. There were no dangers before it missed?

A. Before it missed?

Q. Yes, sir.

A. It is just this way. In raising that draw bar he raised
313 his head between this caboose and this false work on this shovel.

Q. My question to you is, and didn't I understand you to say, that he raised his head before he missed the coupling?

A. His head—

Q. Didn't you say that?

A. I certainly did, because the coupling never was made.

Q. Was there any danger there before he missed the coupling?

A. Before he missed it?

Q. Yes, sir.

A. There certainly was, for it was never made.

Q. Didn't the danger take place after he missed the coupling?

A. After he missed it?

Q. Yes, sir.

A. No, sir.

Q. There was no danger after he missed the coupling?

A. The danger was all over then. It was done.

Q. So that if he missed the coupling there was no danger?

A. The accident happened—his head was crushed, before the bar ever touched the draw head, on account of him raising his body in raising this bar.

Q. If he had made that coupling there would have been no danger, would there?

A. He could not make it as long as his head was between
314 the car and the shovel, on account of there not being space enough.

Q. If he had made the coupling would there have been any danger?

By the COURT: I understood him to say that his head was crushed before the bar reached the coupler.

(WITNESS:) Yes, sir.

Q. Before it reached the coupling it was crushed?

A. Yes, sir.

Q. Then you say that he could not make the coupling without getting his head crushed. Is that true?

A. I didn't say that.

Q. Why couldn't he?

A. The coupling could be made by a man holding his head down underneath this false work, the same as I did. I made the coupling and my head is not crushed.

Q. When you made it were they pushing the train up against the caboose?

A. The caboose was shoved up by a yard engine, in the same manner.

Q. Wasn't it pushed up by hand?

A. No, sir.

Q. Then these men are mistaken when they say it was shoved up by hand?

315 A. The caboose was shoved up with an engine.

Q. What engine was this that shoved this caboose up against this shovel car?

A. I didn't take the number. It was a B. R. & P. engine.

Q. When did they back it to the caboose?

A. They brought it and took hold of the caboose and took Mr. Schlemmer down to the office where he could get medical attention.

Q. And then they came back, did they, and backed up the caboose?

A. After we got the doctors we brought the caboose to the Y. M. C. A. and took Mr. Schlemmer out and carried him to the Y. M. C. A. Then we brought the caboose back and carried it to the steam shovel and the 17 cars and coupled it on by the engine shoving the caboose against the 17 cars. I got underneath there and made the coupling.

Q. It just shoved the caboose against the 17 cars instead of shoving the train against the caboose?

A. There is not any difference in that.

Q. That was the usual way to couple a caboose onto a train?

A. No, that was not the usual way, for we were not in the habit of carrying a caboose behind the train for that purpose.

Q. Don't you know that that was a very unusual way to couple a caboose to the train?

316 A. Which was?

Q. To take the caboose with the engine and push it against the train?

A. That has been done many times.

Q. How often did you see it done before this?

A. I could not say that.

Q. Where did you see it done?

A. I don't know just the very spot. Any man who has railroaded any length of time has seen it.

Q. And I understand you that the men did not push that caboose up to that shovel-car and couple it that evening.

A. No, sir. It was shoved up by an engine.

Q. What position had you in this crew?

A. I was conductor.

Q. And you say that the train was pushed back towards the caboose.

A. When we pulled out on the switch, yes, sir.

Q. That was the usual way of making those couplings?

A. Yes, sir.

Q. Did Adam Schlemmer know that the bottom of that shovel car would go over the automatic coupler?

A. A man with good eyes—I naturally suppose he would see it. I don't know whether he knew it or not. I could not swear that he did.

317 Q. Who told him it would go over?

A. He was not told it would go over. He was told to keep down. That was enough to let him know that it was dangerous.

Q. And he did keep down, didn't he?

A. To a certain extent; but not low enough to keep from getting caught.

Q. If he had kept down one inch lower he would not have gotten caught, would he?

A. I could not say how many inches.

Q. Just tell us again what you did tell him?

A. About keeping down low?

Q. Yes, sir.

A. When he came up there I told him to keep down low, so he would be out of danger, so if it would happen to come back when he was coming back to make the coupling so he would be out of danger, so he would not get hurt.

Q. How long had Adam Schlemmer been working with you?

A. Three or four years. I don't remember the exact number of years or months.

Q. And what killed him?

A. By getting his head crushed.

Q. What crushed it?

A. It was crushed between the false work of the steam shovel and the end of this caboose.

318 Q. Which side of him was next to the steam shovel?

A. I could not say exactly whether his side was. It was more the front and the back than it was the side.

Q. Was the front of his face or the back of his head, then, towards the steam shovel?

A. He was facing the caboose.

Q. His back then, was to the steam shovel?

A. Yes, sir, more or less.

Q. How high up had he raised this draw bar?

A. This draw bar could be raised from about 28 inches to about 37, and he would have to raise it just about half way.

Q. Had he to raise it above his head?

A. It had to be about five or six inches.

Q. Had he to raise it above his head?

A. He would have to raise it level with his head—just about level with his head—in order to make this coupling.

Q. How would his body be when he would raise it?

A. It would be down beneath the bar.

Q. Was he between the tracks?

A. Between the rails.

Q. Could he have made it any other way?

A. No, sir.

Q. Was he sitting on the ground, or how was he?

A. He was just stooping down.

319 Q. Did he have any lantern with him?

A. I could not say whether he had his lantern or not.

Q. Didn't you testify before that he had?

A. I don't remember whether I did or not.

Q. Had you your lantern with you?

A. I did.

Q. Was it lit?

A. Yes, sir.

Q. Where was Schlemmer's lantern?

A. I could not say.

Q. Were his knees down on the ground?

A. No, he was not exactly on his knees. He was just stooped down underneath the car like.

Q. Were his knees bent?

A. Yes, sir. A man certainly would have to bend his knees to get down underneath the car.

Q. Did he bend at his thighs—his hips?

A. He bent his hips and knees and ankles—all three.

Q. He crouched down there in under that shovel car?

A. Yes, sir.

Q. Low down?

A. Yes, sir.

320 Q. Did I ask you whether he had to watch that hole while he was putting that in—the draw bar?

A. You did.

Q. What did you say?

A. I said he did.

Q. Could he be watching anything else at the same time that he was watching that hole?

A. I could not say whether he was watching anything else or not.

Q. He could not be, could he?

A. I have watched more than one thing at once.

Q. If he was watching that hole in front of him could he be watching what was behind him at the same time?

A. He knew what was behind him.

Q. My question is, could he be watching anything behind him?

A. A man cannot see behind him and in front of him both.

Q. Could he be watching anything above him when he was watching that hole?

A. Well, a man can see quite a little bit, you know, from there to there (indicating), and this way.

Q. While he is looking in front of him at a certain object?

A. Yes, sir.

Q. He would not see as well up above when he was looking at it, would he?

A. No, sir.

321 Q. If there had been bumpers on that shovel car that would have struck that automatic draw head would he have been killed?

A. If there had been bumpers on the car it could not have touched the drawhead on the caboose on account of this false-work catching the frame on the end of the caboose first.

Q. If there had been bumpers of the same height as the automatic coupler—if they had been on this shovel car, now—and they had struck the automatic coupler, would that man have been killed?

A. I say just as I said before. If there had been bumpers on there it never would have struck the draw head—if they had been on the caboose.

Q. If they had struck, then would he have been killed?

A. If they had struck, no; but they were not there to strike.

Q. Because he held his head away out to one side of where the bumpers were, wasn't it? Wasn't he clear of the splash board?

A. Yes, sir.

Q. And wasn't that away off to one side of where the bumpers would have been?

A. Yes, sir.

Q. If they had been on there the cars could not have come together, could they?

322 A. If the bumpers had been on that car, the way this shovel was constructed the bumpers would have had no effect whatever.

Q. If they had been low enough down to have struck the automatic coupling, then they would have kept them apart, wouldn't they?

A. You don't understand the way this steam car was constructed.

Q. I am asking you, if the bumpers had been of the right height to have struck the automatic coupling, whether then the cars could have come together out on the side.

Objected to.

By the COURT: He says this false work extended away out beyond any bumpers that could have been on there and it would have struck before the bumpers—if I understand the testimony.

(WITNESS:) Right you are.

Q. Did the shovel car have bumpers?

A. I would not swear it did.

Q. Did the caboose have bumpers?

A. No, sir.

Q. If the shovel car had had an automatic coupling on of the

same height as the one on the caboose, would the cars have come together out there at the splash board?

A. No, sir.

323 Q. How far apart would they have been?

A. Two or three feet.

Q. What kind of couplings were on cars at that date?

A. On ordinary cars?

Q. Yes, sir.

A. Patent couplers.

Q. That is automatic couplers?

A. Yes, sir.

Q. And they were of the same height on cars, weren't they, so that they would couple to each other?

A. As a general rule, yes, sir.

Q. And would couple by impact?

A. Yes, sir.

Q. And it was not necessary for men as a general rule to get in between the tracks, was it?

A. No, sir.

Q. That was a dangerous coupling, wasn't it, that he had to make?

A. More or less, yes.

Q. And a difficult one, too, wasn't it?

A. In one sense of the word it was difficult, and in another one it was not. It was very simple.

Q. Did not the conditions and situation there make it a
324 difficult coupling to make?

A. To a certain extent it was.

Q. If Mr. Schlemmer had made the coupling that evening would not that have kept these cars apart sufficiently not to crush his head?

A. If he had kept his head down he could have made the coupling, but instead of that his head was raised, and that would not allow this bar to come in this slot in this draw head; and so therefore the accident happened before the bar ever entered into that slot.

Q. How far out from the shovel car did that draw bar stick there? How far out did it go?

A. About six or seven inches.

Q. Do you say it only stuck out six or seven inches,—the draw bar?

A. Out from under the false work.

Q. I am asking how far out from the end of the steam shovel car the draw bar stuck when it was straightened out.

A. The draw bar was two and a half or three feet long.

Q. And when it was straightened up there how far out from the end of the shovel car did it stick?

A. It would stick out four or five inches from this false work.

Q. Not any farther than that?

A. I don't think it was any farther than that.

325 Q. And when the coupling was made how far would it permit the shovel car and the caboose to go together—when it was made?

A. I could not say exactly. It would be very close.

Q. How many inches?

A. I could not say exactly.

Q. Then, even if the coupling was made it let the cars come together close enough to crush his head? Is that true?

A. I could not say about that. I don't hardly think it would.

Q. It would keep them apart far enough not to crush his head, wouldn't it—the thickness of his head?

A. I naturally suppose it would.

Q. Had Schlemmer's head been crushed before the free end of the draw bar—that is, the free end of the draw bar that he was coupling with—had his head been crushed before that end of the draw bar touched the automatic coupler?

A. Had it?

Q. Yes.

A. Yes, sir.

Q. Was he engaged in raising and guiding that draw bar into the slot in the automatic coupling when he was killed?

A. Yes, sir; he was engaged in attempting to make the coupling.

Q. He was engaged in attempting to make the coupling?

A. Yes, sir.

326 Q. He was making that effort in a proper way, wasn't he, to make the coupling?

A. Yes, sir, with the exception of raising his body.

Q. If anything that was a mis-calculation on his part, wasn't it?

A. I could not tell about his calculations.

Q. You do not say that he purposely put his head up in there, do you?

A. No. Any man would not naturally put his head up there without he wanted to commit suicide, intentionally.

Q. You have no reason to think that he wanted to commit suicide?

A. None whatever.

Q. From what you say there and know about it you have no reason to believe that he intentionally raised his head up there, do you?

A. No, sir.

Q. What would you say as to it being intentional or unintentional on his part—putting his head up?

A. I would say it was unintentional on his part. I don't believe any sane man would raise his head up there, knowing that he was doing it.

327 Q. Can you explain to us, now, how his head got crushed when he was trying to make that coupling before the draw bar touched the automatic coupling?

A. In getting down underneath there and guiding this draw bar he raised his body so as to allow his head to come between the end of this splash board and the end of the false work on the steam shovel. That was the way it caused his death.

Q. What crushed his head was the cars coming together, wasn't it?

A. Yes, sir.

Mr. HARRY C. COATES, called as a witness by the defendant, sworn; examined by Mr. Gordon.

Q. Were you in the Dubois yards at the scene of this accident on Sunday, August 5, 1900?

A. Yes, sir.

Q. What were you doing there?

A. I was yard conductor.

Q. Conductor of the shifting crew?

A. Of the yard crew, yes, sir.

Q. I want you to state where you were standing when the accident occurred?

328 A. I was standing on the left hand side of the track going south.

Q. How far from Mr. Schlemmer?

A. I should judge I was about 15 or 20 feet, away from him. He was on one side of the track and I was on the other.

Q. Did you have any conversation with him just before the accident occurred?

A. Just before the cars got together I walked up to him, or I walked up to the caboose, and I told him that they had better shove that caboose on by hand. He said, "Never mind. I will make this coupling." "Well," I said, "you will have to get down." And as the cars still got closer together I saw he was too high. He got down in the first place; and he got down again. But in raising the link he raised his head.

Q. Did you call to him twice to get down?

A. Yes, sir.

Q. If he had obeyed your directions would he have been hurt?

A. I don't think he would, no.

Q. Then you called to him twice to get down?

A. Yes, sir.

Q. How long a time was the second time before he was injured?

A. Not more than a second, probably, a couple of seconds, or something like that.

Q. And the first time was how long?

329 A. They were probably 15 or 20 feet away from the caboose at that time.

Q. But how long was it before the accident occurred that you told him the first time that he would have to get down and keep down?

A. The cars were then 10 or 15 feet apart, the steam shovel and the caboose.

Q. They stopped the train after the first time you told him did they?

A. It just came to a stop, and started right away again.

Q. Did you have a sufficient crew to push the caboose up by hand?

A. There were three men there.

Q. Had you your yard crew in the neighborhood?

A. Yes, sir, the yard crew stayed right near there.

Q. How many men had you there?

A. I had three men.

Q. Mr. Casey was there?

A. Yes, sir.

A. And Mr. Neilson?

A. Yes, sir.

Q. Were there any brakemen on the train, besides?

A. On the freight train?

Q. Or Neilson's train.

330 A. Yes, sir, he had two men that I knew of.

Q. Was there plenty of force to shove the caboose up by hand?

A. Yes, sir.

Q. Was that a safe way of making the coupling?

A. It would have been a great deal safer than backing onto it.

Q. And when you suggested this to Mr. Schlemmer he said, "Never mind. I will make the coupling?"

A. Yes, sir.

Q. Had he been talking to Mr. Casey immediately before that?

A. Indeed I could not say that.

Q. How long had you known Mr. Schlemmer?

A. I should judge about five or six years.

Q. Was he a competent brakeman?

A. Yes, sir, so far as I knew.

Q. Did he understand how to make this coupling without instructions?

A. He had ought to, yes, sir.

Q. Was it simple?

A. Yes, sir.

Cross-examined by Mr. TRUITT:

Q. What is your name?

331 A. Harry Coates.

Q. Where are you employed?

A. On the B. R. & P. Railroad.

Q. The defendant in this case?

A. Yes, sir.

Q. Where?

A. At Dubois.

Q. At the present time?

A. Yes.

Q. What is your position there now?

A. Yard conductor.

Q. You have been in the employ of the defendant ever since this accident occurred, have you?

A. Yes, sir.

Q. Now, you say that that evening that it occurred you suggested to Mr. Schlemmer that you men push the caboose down on the train, down to the shovel car?

A. I did not say us men. I said, "You had better push the caboose up against the train".

Q. You say you told him that?

A. Yes, sir.

Q. You testified before the Coroner's Inquest after this, didn't you?

A. I don't recollect.

332 Q. Don't you know that you were a witness before the coroner?

A. Yes, sir.

Q. You didn't tell that there, did you?

A. No, sir.

Q. You testified at the first trial of this case, didn't you?

A. Yes, sir.

Q. And you didn't tell it at the first trial?

A. I don't know that I was asked that.

Q. You know that you didn't tell that, don't you?

A. No, I didn't tell that.

Q. Who told you to tell it?

A. Nobody.

Q. Who did you tell it to the first time you ever told it, that you went to Adam Schlemmer: and what did you tell him.

A. I told Adam Schlemmer that he had better shove the caboose up by hand.

Q. Who on and after did you first tell that to, if you didn't tell it at the Coroner's Inquest and didn't tell it at the first trial of this case?

A. I was not asked that that I know of.

Q. Who did you first tell that to?

A. I just got through saying it here now.

Q. And you never told it before until you told it to day on the witness stand?

333 A. I don't think I did, no, sir.

Q. You never mentioned it to anybody?

A. Oh, yes, I have mentioned it to several people.

Q. To whom?

A. To railroad men.

Q. I want to know their names.

A. I could not just say who; but in conversation about men being killed it came up in that way.

Q. Tell us the name of one person that you told that to before to day.

— — —
Q. Where were you when you told it?

A. Around the railroads.

Q. What part of the railroad? Where at?

A. At Dubois.

Q. What part of Dubois?

A. Dubois yards.

Q. And who did you tell it to in the Dubois yards?

A. There are lots of fellows there I told it to: men that were working for me.

Q. Tell us the names of some of them, so we can go and ask them.

A. You can ask George Mott.

Q. You told it to George Mott?

A. Yes, sir.

334 Q. In the Dubois yards?

A. In the Dubois yards.

Q. When?

A. Quite a while ago. I could not just say when.

Q. A year ago?

A. I don't know whether it was that long ago or longer than that. It has not been that long ago. It was through the coming up of this case that we were talking—through this case in some way—that is, about him being killed. And the way I happened to mention it, I said, "This case is coming up again". And through that way we got to talking; and he had not been here at the time of the accident—he was not on the B. R. & P. And through that way I just mentioned this to him.

Q. And you kept it for about seven years to yourself?

A. Oh, no.

Q. Didn't you say this occurred within the last year?

A. I said I had been talking about it lately. I had been talking about it years ago.

Q. Who did you talk about it to years ago?

A. I could not just say then—at that time.

Q. You say, now, that you told him to keep his head down?

A. Yes, sir.

Q. When he was in there?

335 A. Yes, sir.

Q. You say that you testified at the Coroner's Inquest?

A. Yes, sir.

Q. And you didn't tell that there, did you?

A. That I told him to keep his head down?

Q. Yes.

A. Yes, sir, I did.

Q. I will just show you your testimony with your signature on it; and then tell me where you told that. (Paper handed to the witness.) Is that your signature?

A. Yes, sir.

Q. You just read your testimony there and show me where you told in that testimony that you told him to keep his head down.

Mr. M'CAULEY: We would like to know whether that was taken down in short hand, at that inquest?

Mr. TRUITT: That is the testimony taken at the Coroner's Inquest of Mr. Coates.

336 Mr. GORDON: These statements were proved by Mr. Coates at the last trial when he was a witness on the part of the plaintiff, that he told him twice to keep down there.

By the COURT: The witness says he made that statement. I don't know whether it is in here or not.

Q. That is your signature to that testimony, isn't it?

A. Yes, sir.

Q. Is it in your testimony?

A. I do not see it here.

Q. You do not find in your testimony before the coroner that you told him to keep his head down, do you?

A. I do not find it in this, no, sir.

Q. When did you first tell that?

Mr. M'CAULEY: Tell what?

Q. That you told him to keep his head down?

A. When did I tell that?

Q. Yes, sir.

A. I told Adam Schlemmer that?

Q. But I mean after he was killed when did you first tell it?

A. I probably told it to lots of people.

Q. You say that you told him to keep his head down?

337 A. Yes, sir.

Q. He did keep his head down, didn't he?

A. Yes sir, he got down: and then he raised his head as he raised the bar.

Q. He didn't disobey you, did he?

A. No, sir.

Q. Was he a member of your crew?

A. No, sir.

Q. Had he a right to listen to any instructions from you?

A. No, sir, he had no right to take any instructions from me whatever, although a railroad man would caution another in a case of that kind, you know.

Q. What part of his head was crushed?

A. Right across here. (Indicating crown).

Q. The top part?

A. Yes, sir.

Q. About how much of the top?

A. I would not say for sure.

Q. Was that what killed him?

A. His head had blood up over the top.

Q. That is what killed him, is it?

A. Yes, sir, that is what killed him.

Q. How did he undertake to make this coupling? Didn't
338 he take hold of the draw bar?

A. Yes, sir.

Q. With which hand?

A. With his right hand.

Q. And where was he trying to put it?

A. Into the slot in the knuckle of the drawhead.

Q. He was watching that hole in there, wasn't he?

A. Yes, sir, he would have to.

Q. He would have to do that?

A. Yes, sir.

Q. When he was watching that hole there could he be watching what was behind him or back of him?

A. He would not need to watch what was behind him or back of him.

Q. I am asking you, could he?

A. No, he could not.

Q. Could he watch what was up above him?

A. Yes, sir.

Q. Could he see just as well what was up above him when we was watching in that hole as if he had been looking up above?

A. Why no, not just as good.

Q. When he tried to make this was he down on the ground?

A. He was stooping down, yes.

Q. Between the rails?

A. Between the rails.

339 Q. Was that necessary?

A. Yes, sir.

Q. He could not have made this draw bar coupling there that evening any other way, could he?

A. No, sir.

Q. Didn't he stoop down as low as he could get to make it?

A. He could have kept down in under the frame of this steam shovel.

Q. One inch lower, could he?

A. Probably one or two inches lower would have been all right.

Q. Would that have cleared him?

A. Yes, sir.

Q. Didn't he have his ankles bent?

A. Yes, sir.

Q. And his knees?

A. And his knees.

Q. And his hips?

A. Yes, sir.

Q. All bent up together—crouched down in there?

A. Crouched down in there, yes, sir.

Q. You do not testify that he intentionally put his head up in there?

A. No, sir; not on purpose, he did not.

340 Q. Isn't it this way—that he just miscalculated that thing one inch?

A. Yes, sir, very likely.

Q. That was a dangerous coupling to make, wasn't it?

A. Well, in one way, it was dangerous.

Q. Didn't you testify on the first trial that it was?

A. Yes, sir. I say in one way it was dangerous.

Q. The end of the shovel car went over the automatic coupling, didn't it?

A. Yes, sir.

Q. And that let the end of the shovel car and the end of the caboose come together, didn't it?

A. Yes, sir.

Q. If there had been automatic couplers there that came together would his head have been crushed?

A. An automatic coupler could not reach out that far, from the way the box was built on the car.

Q. They are on the shovel cars now, are they not?

A. Yes, sir.

Q. If at that date it had been on, and this one on the caboose, and

the automatic couplers had come together, that would have kept the cars apart out at the splash board, wouldn't it?

A. Yes, sir, it certainly would.

341 Q. Where was his head caught? Wasn't it out by the splash board?

A. It was caught between the splash board on the caboose and the end of the steam shovel.

Q. The shovel car did not have any bumpers on?

A. No, sir.

Q. If it had had bumpers on that would have come between the automatic couplings he would not have been killed, would he?

A. The way the boxes are built out on the car it would have been no use to put bumpers on them.

Q. Suppose they had had them on and they would have gone up against the automatic coupling on the caboose: would not that have kept the cars apart at the splash board?

A. Yes, sir.

Q. Wasn't it the lower edge of the shovel car that struck his head and crushed it?

A. Yes.

Q. Of course he ought to have been told before he went in there that that shovel car would go over the automatic coupling, shouldn't he?

A. I don't think he had. He ought to have known that. A man by looking at it would notice that. A man could not help but notice it.

Q. How long had he noticed it?

342 A. He had plenty of time from the time he went out to make the coupling to notice what kind of a car he had.

Q. The time that he was in there he had time to notice everything around there?

A. Oh, yes.

Q. You want to testify to that?

A. Yes, sir.

Q. That he could see all the danger in there?

A. I could not say that, no, sir, what he could see you know.

Q. When he coupled this the train was coming towards the caboose, wasn't it?

A. Yes, sir.

Q. And towards him?

A. Yes, sir.

Q. And you say that it was safer to go and couple the caboose up against the shovel car than to push the train to the shovel car?

A. Yes, sir.

Q. That was a safer way of making this coupling?

A. That was a safer way, yes, sir.

Q. Afterwards did they make the coupling that way?

A. They pushed the caboose up with the yard engine I had charge of.

343 Q. They pushed the caboose up with the yard engine to the shovel car?

A. Yes, sir.

Q. They just had the little caboose to manage then?

A. That is all.

Q. And that was a safer way to manage this than to push the train?

A. Yes, sir, that was a safer way.

Redirect examination by Mr. GORDON:

Q. Didn't you tell me about this proposition to shove the caboose up by hand prior to the last trial, with the request that I would not ask you about it unless it was necessary?

A. Yes, sir.

Objected to.

Q. On account of Mrs. Schlemmer?

A. Yes, sir.

By the COURT: That is leading. If it is objected to on that ground we will sustain the objection.

Objected to as leading.

Q. Did you tell any of the lawyers connected with this case about this transaction?

A. How is that?

344 Q. Did you tell any of the lawyers about this proposition to move the caboose up by hand prior to the last trial—any of the lawyers?

A. Yes, sir, I did. I told Mr. M'Cauley.

Q. Which one of us.

A. That man right there. (Indicating.)

Q. Mr. M'Cauley?

A. Yes, sir.

Recross-examined by Mr. TRUITT:

Q. Were you present at the first trial of this case?

A. Yes, sir.

Q. You were called on the part of the plaintiff, Mrs. Adam Schlemmer?

A. Yes, sir.

Q. She was then the widow of Adam Schlemmer?

A. Yes, sir.

Q. I was her attorney, wasn't I?

A. Yes, sir.

Q. I called you, didn't I?

A. Yes, sir.

Q. I talked to you before I called you, didn't I?

A. Yes, sir, I think you did.

345 Q. And asked you about this case. Did you tell one word to me, as her attorney and as my witness, about this conversation with him as to the safe way to do this?

A. I think probably I told you about the same.

Q. Do you say you told that to me?

A. To the best of my knowledge I told you the same.

Q. You recollect now that you told that to me?

A. Yes, sir, I believe I did.

Q. Where was I when you told me?

A. I don't just recollect now just where you were—where I was talking to you.

Q. And you were a witness on the stand?

A. Yes, sir.

Q. And you never told it at all as a witness?

A. I certainly did if it was asked me—if the question was asked.

Q. You didn't tell it, did you?

A. I believe I did. I didn't notice it on that testimony there.

Q. I am talking about the first trial, in Court here. Now you say you told Mr. M'Cauley?

A. Yes, sir.

Q. Before the first trial in Court here?

A. Yes, sir.

Q. And he didn't ask you a word about it on the cross-examination, did he?

A. I don't recollect whether he did or not. I don't think he did.

Q. And Mr. Gordon, did not, did he?

Mr. GORDON: I cross-examined him, and I refrained from asking him that because he requested me to. I am stating that as an officer of this court.

Mr. JAMES CASEY, recalled as a witness by the defendant.

Examined by Mr. GORDON:

Q. Did you have any conversation with Mr. Schlemmer immediately before this accident?

A. I had sir.

Q. Just state what it was.

A. Just before the accident to this man that I understood afterwards to be Adam Schlemmer him and I were talking about Altoona. He asked me where I lived.

Q. Where were you seated, or where were you?

A. I was seated in the South end of the caboose—and he was cleaning lamps in the northern end. I was acquainted with some parties in Altoona that he was acquainted with.

Q. Do not give the details about that, but just about this case.

A. And just then he saw the train coming down—backing up; and he left the work that he was doing stand, and he got out on the front part of the caboose. I said "We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." He got down on the ground—

Q. What reply did he make?

A. He got down on the ground, and he said "Oh, hell; back up". And then the conductor came and inserted the pin slantways, and stepped back and gave the signal to back up slowly.

Q. How did the train come back?

A. Slowly.

Q. Did it stop before it reached there?

A. Yes, sir: it stopped while conductor Neilson was setting the pin.

Q. How far was the end of the draw bar from the knuckle of the caboose coupler when it stopped?

A. I judge 8 or 9 feet, as near as I can recall. I did not measure it.

Q. Have you seen this steam shovel coupled prior to this
348 time and since?

A. Yes, sir, prior and since.

Q. How often?

A. I had charge of it from Butler, the previous year, to Youngstown, Ohio, and I saw it coupled three times on that route. And the next day the parties in Punxsutawney coupled it.

Q. Have you seen it coupled while you were at work?

A. Oh, yes, we used to couple coal cars to it.

Q. Frequently or otherwise?

A. I could not just say frequently. A couple of times, I guess.

Q. As to making the coupling by pushing the caboose up by hand—what do you say as to the safety of that?

A. I think it would be a very safe plan.

Q. Would there be any danger connected with it?

A. Not any more than there is in riding on a passenger train. There is danger in that on some railroads.

Q. Go on and state how the accident happened.

A. The flagman got out, and this man Mr. Schlemmer got hold of the end of the draw bar, and then when it came back to the caboose he got hold of the caboose and leaned down like that
349 (indicating) and got the bar up; and in lifting the draw bar he raised his head, and it caught about there (indicating).

Just then I walked up to the front of the train where a couple of brakemen and the fireman and engineer were standing and I told them about it. I didn't like to stand there.

Q. It made you sick did it?

A. Yes, sir.

Q. After they took Mr. Schlemmer up to the Y. M. C. A. on the caboose did they return with the caboose?

A. Yes, sir.

Q. How did they couple to the steam shovel at that time?

A. The conductor coupled it. He got down under the shovel, and the yard engine pushed the caboose up, and he coupled it.

Q. Did he have any trouble?

A. No, sir.

Q. At what time was it when the accident occurred?

A. As near as I can give it it would be about fifteen minutes after eight.

Q. Was it still day light?

A. Yes, sir, about dusk.

Q. Could you see plainly what was happening?

A. Oh, yes, I could see.

350 Q. Have you seen many steam shovels?

A. Yes, sir.

Q. Prior to this time how were they generally equipped—with what kind of couplers?

A. With the old link and pin.

Q. And draw bar?

A. Yes, sir, in some cases a draw bar. Generally under the circle, the way the old Marion was equipped. The circle they swung the dump on swung out about two feet over the bull nose in here, and they would have to have a draw-bar in there.

Q. You may state whether an automatic coupler could have been attached to this particular steam shovel without rebuilding it.

A. I guess it would have cost a great deal.

Q. Could it have been done without rebuilding the shovel?

A. I don't know what you would have fastened it to up above. There were nothing but inch boards.

Q. Did you ever see anybody have any trouble with this coupling before or with similar couplings on steam shovels?

A. No, sir.

Q. With care could the coupling be made safely?

A. Yes, sir.

351 Q. What was it as to a complicated or simple coupler?

A. It was a simple coupler. While dangerous, it was simple.

Q. Was there anything that an experienced brakeman could not see at a glance?

A. Not that I know of.

Q. Could a man see at a glance that the body of the shovel was high?

A. Yes, sir, he could.

Q. You spoke of this being a car. Was there any car about it, Mr. Casey—or was it a machine?

A. It was a machine, stationary, set on the body of a car. They are not cars. They are——

Q. Shovels—straight: steam shovels?

A. Yes, sir. There is nothing, hardly. There are holes in the bottom of them to let the machinery protrude down through. You could not say it is a car in any way.

Q. What was the name of this machine?

A. The Marion steam shovel. Barnhart was the maker of it.

Q. Did it have any number on it corresponding to car numbers, or anything of that kind?

A. No, sir. The only number that was on it was the shop number. Every shovel that is turned out of the shop is numbered, from one upward.

352 Q. Have you had any experience as a locomotive engineer?

A. Yes, sir.

Q. How many years?

A. It was for these little dinkey engines. About two years.

Q. You have seen many couplings made, have you?

A. Oh, yes. I fired on-e for 11 months on the Pennsylvania Railroad from Altoona to Harrisburg previous to this; and I fired for 8 months on the Long Island Railroad, afterwards.

Q. You have been accustomed, then, to handle machinery for many years?

A. Yes, sir. I have worked in the Altoona shops.

Q. Unintentionally there has been an impression left, perhaps, that this construction outfit was travelling on its own wheels—other than the steam shovel.

A. Yes, sir, the wheels and all came from the same shop.

Q. But about the balance of the outfit being loaded on the same cars?

A. You mean the dipper?

A. I mean the dipper and the dump cars.

A. They were all loaded on B. R. & P. cars.

Q. What was the whole thing called; was it a construction outfit?

353 A. Yes, sir, a contractor's outfit, belonging to T. F. Ryan.

Q. Then there were 17 car loads of the outfit, and the steam shovel?

A. Yes, sir.

Q. All belonging to T. F. Ryan?

A. Yes, sir, all that was in the 17 cars.

Q. How long were you at Dubois from the time you reached there until the time you started to Punxsutawney?

A. I think we got in there about two o'clock in the morning, as near as I can recollect—maybe two or three—and we left on the local in the morning, at six or seven.

Q. No, at Dubois.

A. About 45 minutes. I thought you meant Punxsutawney?

Q. What time did you leave for Punxsutawney?

A. I could not tell you. Very near nine o'clock.

Cross-examined by Mr. TRUITT:

Q. Your name is James Casey?

A. Yes, sir.

Q. Where did you come from to Brookville?

A. Allicottwill, New York.

Q. How long have you been there?

A. I have been there a year and three or four months.

Q. Where were you before that?

354 A. I was working for the B. R. & P. operating a steam shovel at Ridgway.

Q. This defendant company?

A. Yes, sir.

Q. Are you working for it now?

A. No, sir.

Q. At the date this accident occurred where did you come from?

A. Limestone, New York. The date? No: from Bradford.

Q. In this state?

A. Yes, sir.

Q. How long had you been there then?

A. At Bradford?

Q. Yes, sir.

A. We came in the day before.

Q. Who were you employed for?

A. T. F. Ryan.

Q. To work for this company?

A. He was doing work for the company, but I was working for Mr. Ryan.

Q. Mr. Ryan had several contracts for this company, hadn't he?

A. That is the only one I ever knew him to have.

Q. Where was that at?

A. At Limestone.

355 Q. And that was in 1900, was it?

A. Yes, sir.

Q. Were you here at the first trial of this case?

A. Yes, sir.

Q. And you say that you talked to Mr. Schlemmer about making this coupling?

A. Yes, sir.

Q. That, you say, was when the train was coming back to the shovel-car?

A. Yes, sir.

Q. And he was down, ready to make it?

A. Yes, sir.

Q. About how many feet away?

A. About 7 or 8 feet.

Q. And it was coming at him?

A. Coming back, yes, sir.

Q. And he took hold of it with his right hand,—the draw-bar coupling?

A. Yes, sir.

Q. Which hand?

A. The right hand.

Q. And where was his left hand?

A. It was coming back. He had hold of it; and it came within reaching distance of the caboose, and he reached out to get
356 hold of that train; and then it came on, and he reached up like that (illustrating), and in raising up he raised his head up.

Q. He raised up to see the hole in the automatic coupler?

A. I don't know what he raised up for. I could not answer that.

Q. He had to watch the hole in the automatic coupler?

A. Oh, yes. They generally do watch what they are doing around coupling cars.

Q. Who was there when you told Adam Schlemmer this?

A. Nobody that I saw.

Q. Was not Neilson there?

A. Neilson was coming back with his train.

Q. Was not Coates there?

A. I did not see him.

Q. Then neither Neilson nor Coates was there when he got killed?

A. Neilson was coming back with his train. When I told him, he was, I judge, about 8 or 9 yards, at the shovel.

Q. When he got killed?

A. No; but before he got killed.

Q. Just at the time that he was making the coupling?

357 A. Oh, no. After they came back I stepped away. After cautioning the man as to his danger, I left it to his own judgment then.

Q. As I understand you, the cars were coming back to be coupled when you told him this?

A. Yes, sir.

Q. Hadn't you been telling him, and didn't you testify right now, that you were right at the place where he made the coupling when you told him this?

A. I was standing on the platform of the caboose, and he was going out. I said, "We had better shove this up by hand, as we did in Bradford."

Q. Then the train was not coming up at all when you told him that?

A. Oh, yes, it was; but we could see the train away off—three train lengths when we saw it.

Q. Then it was away off?

A. It might have been. It was not just that far.

Q. And you don't know that anybody else heard you tell him that?

A. I don't know.

Q. Did you hear anybody else talk to Schlemmer?

A. I heard Neilson.

Q. Did you hear him talk to him?

A. He told him to keep down.

Q. Did you hear that?

358 A. I did, yes, sir.

Q. Is that all he told him?

A. That is all I heard. I stepped back then.

Q. And he did keep down: Schlemmer did keep down?

A. Yes, sir.

Q. The top of his head was caught?

A. Yes, sir.

Q. And that was a safe coupling on there?

A. If the caboose was pushed up against it it was.

Q. And if it was not it was unsafe.

A. It was.

Q. And the usual way was to push the train up to the caboose, wasn't it?

A. Generally, yes.

Q. To couple onto the caboose?

A. Yes, sir.

Q. When you made the coupling up at Bradford did you couple it there?

A. Yes, sir.

Q. How was it coupled there?

A. Shoved it up by hand.

Q. The crew did that did they?

A. Yes, sir, and I assisted.

Q. Pushed the caboose up against——

A. Up against the steam shovel.

Q. And you regarded that as the proper way to make this
359 coupling?

A. I regarded it as the safest way.

Q. And you regarded it as a dangerous coupling to make any other way, didn't you?

A. Yes, sir.

Q. Up at Bradford didn't the defendant company put trucks under this car—under this shovel car?

A. Yes, sir.

Q. Ordinary trucks—four wheeled trucks?

A. Yes, sir.

Q. One under the front?

A. No, sir. That is, one pair of trucks.

Q. Where did they put them—under each end?

A. Under the front end.

Q. And the hind end had a pair on?

A. Yes, sir.

Q. Ordinary car trucks?

A. Yes, sir.

Q. Such as all cars are equipped with?

A. Yes, sir.

Q. On those trucks was a platform, wasn't it?

A. A platform.

360 Q. Yes, or a bottom of this shovel—the floor of the shovel?

A. It was set on springs I guess.

Q. And what was on the springs: wasn't the floor of the shovel on it?

A. Yes, sir.

Q. Didn't that shovel car have sides to it?

A. Yes.

Q. A door in it?

A. Sliding doors.

Q. And windows?

A. Not windows. Just shutters that you could raise up to see out.

Q. A roof on it?

A. Yes, sir.

Q. And ends?

A. Yes, sir.

Q. It looked like a car?

A. Yes.

Q. And this shovel arrangement was built in. Is that it?

A. Yes, sir.

Q. And they were transporting it along on these trucks?

A. Yes, sir.

Q. The boiler and the engine and the shovel machinery
361 were all up above those trucks there?

A. Yes, sir, and stationary there.

Q. And this car was necessary to move it, wasn't it?

A. Yes, sir.

Q. And you were moving it, now, down to Glenshaw, or the place you were going to use it in construction work?

A. Yes, sir.

Q. How many of these shovel cars had Adam Schlemmer seen before that evening, so far as you know?

Objected to as not cross examination.

A. I never met the man before.

By the COURT: I do not see that it is cross-examination; and I don't see that it is material in the case.

Q. If you would put a long draw head on that shovel car could not you put an automatic coupler on it?

A. I have never seen one of them equipped that way. I don't know how long it would have to be.

Q. You never saw it, but it could have been done, couldn't it?

A. You could turn it upside down if you wanted to; but it wouldn't be just right.

Q. Did you notice what part his head was crushed on, on 362 the caboose?

A. Yes, sir.

Q. What part?

A. Right against the splash board and the end of the steam shovel.

Q. Just the edge of the steam shovel?

A. The false work, yes, sir.

Q. The edge of it just caught the top of his head. Is that it?

A. Yes, sir.

Q. About an inch of his head. You do not testify that Mr. Schlemmer put his head up in there intentionally?

A. Indeed, I don't know what his intentions were.

Q. You are not testifying that he did?

A. No, sir.

Q. When he was making this coupling he was all crouched down—stooping down in under there—wasn't he?

A. Yes, sir.

Q. As low as he could get?

A. Yes, sir.

Redirect examination by Mr. GORDON:

Q. Was his head down as low as he could get it?

A. No, sir.

363 Recross-examined by Mr. TRUITT:

Q. He miscalculated it one inch?

A. I don't know how much he miscalculated it.

Q. To the extent that his head was crushed?

A. As soon as he fell I walked away. I don't know.

Q. Isn't that all there was to it, Mr. Casey, that he miscalculated how far down he would put his head to the extent that it was caught? Isn't that true?

A. I don't really know whether he miscalculated or met with an accident with his foot tripping when it was coming back or moving. There might have been many ways.

Q. It occurred while he was lifting up that draw bar, crouched down under there trying to make that coupling?

A. Yes, sir.

Q. Trying to put that heavy draw bar up into that little slot in the automatic coupler?

A. Yes, sir.

The defendant rests.

364 A. J. TRUITT, Esq., called as a witness by the plaintiff in rebuttal; examined by Mr. Corbet.

Q. Just state if prior to the former trial you examined Mr. Harry Coates with reference to his knowledge of the facts relating to this case.

A. I did.

Q. State if he in that examination made any statement to you such as he has stated today he did with reference to what he told Adam Schlemmer?

A. He did not.

Cross-examined by Mr. GORDON:

Q. Didn't he tell you that he told Adam Schlemmer twice to keep down?

A. I don't know but that he said something about that, possibly; but that is very doubtful in my mind now; but he may have.

Q. Didn't he testify to it here in court?

A. Yes, he did.

Q. Did you ask him whether he had told Mr. Schlemmer that he should have that caboose pushed up by hand?

A. I didn't ask him that. I thought he had told me everything about the case, and he didn't tell me.

365 Redirect examination by Mr. CORBET:

Q. He made no mention of that?

A. No, sir.

The plaintiff rests.

Mr. GORDON: I desire to state to the Court that Mr. Coates did tell me about this transaction, with the request that we should not ask him anything about it in case we did not consider it necessary, on the former trial, on account of Mrs. Schlemmer's and the two children's presence.

Objected to as not rebuttal.

Mr. McCAULEY: If there is any controversy about this man making this statement, we can clear the controversy up. I was present at one conversation, with Mr. Gordon; and subsequently the witness made a written statement and signed it. So if there is to be

366 any controversy about that, if they are attacking Mr. Coates, let us meet it right here and now. We have plenty of evidence to show that this man did make this statement repeatedly.

Mr. CORBET: We have simply asked as to any statement made to Mr. Truitt.

By the COURT: The plaintiff is simply offering this testimony to contradict his testimony when he said he did not tell Mr. Truitt.

The defendant rests.

Testimony closed.

5.00 O'CLOCK P. M.

Law argument to the Court.

(Court adjourned until 9 o'clock to morrow morning.)

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WEDNESDAY, January 29, 1908—

Morning Session, 9 o'clock a. m.

Presentation of points of law, and law argument to the Court.

C. Z. Gordon, Esq., argued to the jury for the defendant.

A. J. Truitt, Esq., argued to the jury for the plaintiff.

Charge to the Jury.

GENTLEMEN OF THE JURY: The deceased, Adam Schlemmer, was an employee of the defendant company. It appears that he was killed August 5, 1900, in the course of his employment, while attempting to couple a steam shovel, attached to the rear end of a train of cars, to a caboose standing on the track. This steam shovel was not the property of the defendant, but was being transported by it for T. F. Ryan, a contractor, from Limestone, in the state of New York, to Glenshaw, in the state of Pennsylvania. It was on trucks, and was being transported as cars are usually hauled. It
368 had certain false work about it that made the end project beyond the draw head of the car, and also made it higher than the ordinary car. This shovel car had no dead-heads or bumpers on it, and according to the testimony they would not have been of any use in preventing the accident in this case if the car had been so equipped, inasmuch as the false work extending out over the rear end of the car would have rendered bumpers or dead woods useless in preventing this car from coming in immediate contact with the caboose with which the deceased was attempting to couple it. It was equipped with what is called a draw-bar coupler. The draw head of the coupler was attached underneath the bottom of the car, extending back two or three feet; and in this draw head was fastened the draw bar, which was about three feet long, and hung down at an angle, the free end having a hole or eye in it. This draw bar weighed from 75 to 80 pounds, and when raised level with the bottom of the car extended four or five inches beyond the false work mentioned. The caboose was equipped with an automatic coupler. Like the shovel car, it did not have bumpers or dead heads; and it was not usual to have the same on a caboose.

It had a rear platform, with splash boards over the wheels. The false work of the shovel car was so much higher than the caboose that in coming together the rear end of the shovel car would pass over the top of the automatic coupler on the caboose, and strike against the splash boards on the caboose.

In making the coupling between these two cars it was necessary to get down under the shovel car, between the rails, and take hold of the draw bar on that car and raise it five or six inches, to about level with the head, and guide it into the slot of the automatic coupler on the caboose. It was in performing this act, or attempting to perform it, that the deceased met with the injury which caused his death.

The plaintiff alleges that the draw bar coupler was not in general or ordinary use; that it was a dangerous and unsafe appliance; and that the defendant company was guilty of negligence in not equipping this car with an ordinarily safe coupler. Also that it was the duty of the defendant company to inform the deceased of its dangerous character and to instruct him in the use of the same; and that failure to do so was negligence on its part.

It is admitted that the deceased was an experienced brakeman; that he had been engaged in railroading for 15 or 16 years prior to the accident. And the defendant alleges that the draw bar coupler was well known to railroad men; that its construction was so simple and the method of operating it so plain and easily understood that no instruction as to how to operate it was necessary. The testimony both on the part of the plaintiff and the defendant seems to support this allegation of the defendant. But in this particular instance the plaintiff contends that the coupling of these two cars was rendered unusually dangerous by reason of the fact that the end of the shovel car was higher than the caboose and would pass over the top of the automatic coupler on the caboose, and, being without bumpers or dead heads, would come in immediate contact with it on failure to make the coupling. It is therefore contended that the deceased should have been instructed as to this condition and operation of the two cars, and that a failure to do so was negligence on the part of the defendant. This contention is based on the allegation that the defendant had no knowledge of the fact that the end of the shovel car would pass over the top of the automatic coupler on the caboose, and that no time or opportunity was afforded him to acquaint himself with this fact.

The defendant contends that the deceased was familiar with the equipment of the caboose, and that the equipment and construction of the shovel car were manifest on casual observation, and also the danger incident to coupling it to the caboose.

The plaintiff has offered testimony tending to show that the coupling which the deceased was attempting to make was difficult and dangerous; but the witness called both by the plaintiff and by the defendant agree that it could be made in safety by one acquainted with the conditions exercising care according to the circumstances. This the deceased was required to do; and if the defendant had its cars so equipped that they could be operated, and the coupling made

with safety by the exercise of ordinary care on the part of its employees, it could not be charged with negligence on the ground that this was an unsafe and dangerous coupler on the shovel car, or for failure to instruct an experienced brakeman how to operate a coupler of such simple construction, that its manner of operation, and the dangers incident to it were so manifest as to be at once apparent to any one engaged in the railroading business. Nor can the defendant be charged with negligence for failure to instruct the deceased regarding the construction of this shovel car and that its height above the caboose was such that the end of the same would pass over the top of the coupler on the caboose, if this condition was manifested to any brakeman exercising ordinary observation of the car and care, according to the circumstances, in and about the work in which he was engaged?

There is another ground, however, on which the plaintiff bases her right to recover in this action. It appears that this steam shovel was in use in interstate transportation, and that it was being unlawfully used or transported by the defendant, in that it was not equipped with an automatic coupler as required by act of Congress of March 2, 1893. The United States Congress, deeming the coupling of cars a rather dangerous or hazardous business, passed the act referred to, requiring all cars used in interstate transportation to be equipped with automatic couplers so that the coupling could be effected without employees going in between, or being under the cars, at the time of impact, to make the same. This act also provides that an employee injured by any car in use contrary to its provisions shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use of the car had been brought to his knowledge.

The plaintiff's contention here is that, conceding the deceased had knowledge of the condition of this shovel-car and was perfectly familiar with the danger incident to attempting to couple it to the caboose, with the draw bar coupler with which it was equipped, he nevertheless is relieved by the act of Congress of 1893 from the assumption of risk connected with the act of making such coupling, and that the injury to the deceased is chargeable solely to the risk which he assumed in attempting to make this coupling.

There is a line of decisions in this state which holds that an employee who knowingly and voluntarily engages in a dangerous or hazardous business assumes the risks necessarily incident to his employment, and if injured by one of these assumed risks—although without fault on his part—he is without remedy against his employer by reason thereof. These decisions, however, have no application to the case on trial, because they are superceded by the act of Congress to which I have called your attention, and which provides that where the employer fails to comply with its provisions the employee shall not be held to have assumed the risks of his employment. Hence if the injury which caused the death of the deceased is found to be due solely to the risk to which he was exposed in making the

coupling, by reason of this shovel car not being equipped
374 with an automatic coupler, the plaintiff would be entitled to recover damages to compensate her for the pecuniary loss sustained on account of his death.

There is another line of decisions, however, in this state, which holds that an employee has no right of action against his employer for injuries received in the course of his employment, which are occasioned or contributed to by his own negligence. There is a wide distinction between assumption of risk and contributory negligence, as pointed out in the decisions of our courts of last resort. The defense of assumption of risk is not permitted the defendant in this case, for the reason already stated. But the defense of contributory negligence has been left untouched by the federal statute, and the defendant therefore may still avail itself of this defense.

If you are satisfied from the evidence that the deceased was killed in the line of his employment while acting as an ordinarily careful and prudent man would act in the same circumstances and under the same conditions, then you would be warranted in finding that his injury and death were properly chargeable to the risk of his employment, and inasmuch as the defendant is not in a position to assert this defense, the plaintiff would be entitled to recover.

375 The allegation of the defendant, however, is that the deceased acted recklessly, and unnecessarily exposed himself to the injury which caused his death; and it further contends that the testimony on this point is substantially undisputed. The defendant has called three witnesses who were present at the time of the accident, and who conversed with the deceased about making this coupling immediately before he attempted to make the same. They testify that the deceased was cautioned and told that it was a dangerous and difficult coupling to make. Two of the witnesses testify that they advised him to have the caboose pushed up by hand to the shovel car, and make the coupling in that way. To one of them he replied, "Never mind; I am making this coupling"; and to the other one he said, "Oh, hell; back up". They all advised him to be careful and keep his head down.

The plaintiff however, contends and has offered testimony to show that this was a heavy draw bar, and that the deceased in his cramped position under the car was unable to raise and guide it into the slot in the automatic coupler on the caboose without necessarily raising his body and head more or less: and therefore it is contended that he cannot be held guilty of negligence because of a slight miscalculation in the distance which he raised his head above the danger

376 line.

On the other hand, the defendant contends that there was no occasion for his testing the danger; that he knew it was there and had been several times warned against it; and that by the exercise of ordinary care he could have and would have avoided it. In other words, the defendant contends that there was no occasion whatever for the deceased to place his head or body between the ends of the two cars; that he could not make the coupling by so doing; and that he was injured and prevented from making the coupling because he did put his head between the ends of the cars. Mr. Neilson, the

conductor on this train, expressly states in his testimony that he told the deceased to be very careful not to raise his head, or to get it between the ends of the cars, or he would get smashed; and that the deceased promised him he would be careful not to do this. This witness further testified that it was not necessary for the deceased to raise his head above the bottom of the shovel car in making the coupling; that he was warned to keep his head under the false work of the shovel car, and that is where he should have kept it in making the coupling, and if he had done so he would not and could not have been injured. The testimony of all the witnesses is substantially to the effect that if the deceased had kept his head under the false work of the shovel car he could not have been injured.

Now, gentlemen, it seems to me that the evidence tends very strongly to the conclusion that the deceased unnecessarily and recklessly exposed himself to a danger which was not necessarily incident to his employment, a danger that was obvious and against which he was warned at the time, and by reason thereof was injured. And if you are so satisfied, then your verdict should be for the defendant on the ground of the contributory negligence of the deceased. If there were any testimony in the case to show that the deceased slipped and was injured in an attempt to recover himself, or that he had unexpectedly encountered some difficulty or obstacle in the way of making the coupling, and was injured in endeavoring to overcome and avoid it, or that anything else had intervened tending to show that he was acting the part of an ordinarily careful and prudent man, under the existing circumstances and conditions, in doing what he did do, then there would be some ground disclosed for attributing his injury to the risk of his employment. But is there any testimony to show that it was the result of some non negligent act or thing concurring with the danger to which he was exposed in making the coupling? The testimony of the witnesses—or of those who saw just how the accident occurred—is that it was the result of his unnecessarily and recklessly exposing his person to a known danger, which he could have and would have avoided had he exercised ordinary care and prudence in the performance of the act required of him, or if he had observed the warnings and instructions given him. And if this is so, he was guilty of negligence contributing to his injury, and your verdict should be for the defendant.

If the testimony impresses you as it does the court, and you are satisfied that the deceased was guilty of negligence contributing to his injury, then it will be unnecessary for you to consider the question of damages, because in that event your verdict will be for the defendant. If, however, you conclude that the deceased was not guilty of negligence, and that the plaintiff is entitled to recover, then you will assess and allow such damages to the plaintiff as will fairly compensate for the pecuniary loss sustained by reason of the death of the deceased. He was thirty-one years of age, and according to the vital statistics offered in evidence had a life expectancy of about

thirty-five years. The duration of life, however, depends
379 largely on the condition of health, habits of life, and other
matters affecting health and longevity. These vital statistics
are based on selected cases, and while evidence, they must be viewed
and considered in the light of the evidence in the particular case
on trial. The deceased, according to the testimony, was industrious
and was a man of good habits, and was earning from \$60 to \$80 a
month at the time of his death. The measure of damages in a case
of this kind, where the plaintiff is entitled to recover, is the pecuni-
ary loss,—that is, what the deceased would probably have earned in
his occupation if the injury that caused his death had not happened,
and which would have gone to the support of his family. In fixing
this amount, consideration should be given to the age of the de-
ceased, his health, his ability and disposition to labor, his habits of
life and his expenditures. And if the plaintiff is entitled to recover,
as suggested by her counsel in his argument the jury may consider
the time since the accident up to the present and if deemed advis-
able add what they think should be added to compensate for this
delay, not exceeding, however, the legal rate of interest.

The plaintiff has presented certain points for instruction as fol-
lows:

380 First. Under the evidence in this case the shovel car
Schlemmer, the deceased, was endeavoring to couple to the
caboose, was a car used in moving interstate traffic in contemplation
of the act of Congress, of March 2, 1893, chapter 196.

Affirmed.

Second. If the shovel car was not equipped with couplers coup-
ling automatically by impact, and which could be uncoupled without
the necessity of men going between the ends of cars, and the de-
fendant company was hauling or permitting it to be hauled on its
line of railroad, it was a violation by the defendant company of the
provisions of the act of Congress, of March 2, 1893, chapter 196.

Affirmed.

Third. If the shovel car was not equipped with couplers coupling
automatically by impact, and which could be uncoupled without the
necessity of men going between the ends of the cars, then, under the
act of Congress of March 2, 1893, chapter 196, Schlemmer, the de-
ceased, in his effort to couple the cars, is not to be deemed to have
assumed the risk occasioned by the use of the shovel car by the de-
fendant company in hauling it as it was doing.

Affirmed.

381 Fourth. If the defendant company was a common carrier
engaged in interstate commerce by railroad, and was hauling
or permitting 'o be hauled on its line of railroad the shovel car in
question from a point in the state of New York to a point in the
state of Pennsylvania, and such car was not equipped with couplers
coupling automatically by impact, and which could be uncoupled
without the necessity of men going between the ends of the cars,
and Schlemmer, the deceased, an employé of the defendant com-
pany, was injured and killed by such car, in use contrary to the
provisions of the act of Congress, of March 2, 1893, chapter 196,

while he was endeavoring to couple it to the caboose, then, by the terms of said act, he was and is absolved from any imputation of the assumption of the risk thereby occasioned.

Affirmed.

Fifth. Under the principle stated in the last preceding point, Schlemmer would still be free from any charge or inference of having assumed the risk, notwithstanding he may have known or been told of the danger and cautioned against it.

Affirmed.

These several points are just what we have said to you in our general charge,—that the assumption of risk cannot be interposed here to defeat this action, if the deceased was free from contributory negligence.

Sixth. Even if Schlemmer did slightly miscalculate the height of the car behind him while his duty required him in his crouching position to direct the heavy draw-bar moving above him into the small slot in the automatic coupler on the caboose in front, in the dusk of the evening, such miscalculation under such circumstances was a risk which, under the act of Congress of March 2, 1893, Chapter 196, Schlemmer did not assume.

If satisfied from the evidence that it was necessary for the deceased to get between the ends of the cars in making the coupling and that his injury was the result of slightly miscalculating the height of the car behind him, such miscalculation would be a risk which under the act of Congress the deceased cannot be held to have assumed. But if it was not necessary for him to get in between the ends of the cars to make the coupling and he was warned not to do so and promised to heed the warning, but in disregard of the warning and his promise and without any necessity therefor did put his head between the cars and have it crushed, it would be such negligence on his part as would defeat this action.

Seventh. If the defendant was violating the act of Congress of March 2, 1893, chapter 196, by hauling or permitting the shovel car to be hauled on its line of railroad without being equipped with the couplers required by that act, and Schlemmer was injured and killed by that car so in use, he is not chargeable by the defendant with contributory negligence.

This point is refused.

Eighth. There is no presumption of negligence on the part of Schlemmer after he entered upon the discharge of his duty to make the coupling, and the burden of proving contributory negligence on his part, if alleged by the defendant, is upon the defendant.

Affirmed.

Ninth. That if the jury find from the weight of the evidence that there were different ways in which the coupling might have been made, one of which was safer than the other, then it was the duty of the defendant to have instructed Schlemmer as to the way in which it ought to have been done.

Affirmed. It was also the duty of the deceased to proceed by the safer way to make the coupling, if pointed out to him; and his fail-

ure to do so, and injury resulting by reason thereof, would be
384 such negligence as would defeat this action.

Tenth. That Schlemmer as an employee of defendant railway company was held only to the exercise of ordinary care in the performance of his duties in the line of his employment, and was not held to that extreme care which would absolutely eliminate all possibility of injury.

Affirmed.

Eleventh. If Schlemmer exercised the degree of care and caution incumbent upon a man of ordinary prudence in the same calling under the circumstances in which he was placed, he would not be guilty of contributory negligence that would defeat the plaintiff's right of recovery.

Affirmed.

The points presented by the defendant, without reading to the jury, are severally refused: and the questions of law and also the question of whether the evidence regarding the contributory negligence of the deceased is sufficient to warrant the submission of this question to the jury, are reserved for future consideration, should the verdict of the jury make this necessary.

385 Now gentlemen, the question of first importance for you to determine, as I view this case, is whether the deceased acted the part of an ordinarily careful and cautious man in attempting to couple these two cars together, or whether he went about that work in a careless and negligent manner.

The defendant alleges that he was negligent in two particulars, and that this negligence contributed to his injury. First, it is contended that his negligence is disclosed in the testimony of Harry C. Coates and James Casey, who testify that they called his attention to the danger and difficulty in making the coupling, and suggested that it be made by pushing the caboose by hand up against the shovel car. The testimony is that the coupling could have been made in this way with comparative safety. Where there are two ways of doing a thing, one safe and the other unsafe, it is the duty of the employee to proceed in the safe way. If he rejects the comparatively safe way of doing it and undertakes to do it in an unsafe and dangerous way, and is injured, he will be chargeable with negligence which will bar a recovery for the injury sustained. Such injury is not chargeable to the assumption of risk, since it is a risk created by himself and not one necessarily incident to his employment. Such risks the law labels negligence.

386 The deceased in this case undoubtedly knew that the shovel car was not equipped with an automatic coupler, because in that case it would have been entirely unnecessary for him to get down under the cars. He also knew that it was not equipped with a link and pin coupler, because in that case the coupling would have been made with a stick furnished by the company, and which the deceased was required to use in making that coupling. The only reasonable conclusion from the testimony, is that he knew that it was equipped with a draw-bar coupler, and as an experienced brakeman he knew what was required to make the coupling, and how to make it and the dangers incident to making it. It is also contended

that he knew, according to the testimony of Mr. Neilson, that if he got his head or body between the ends of the cars he would be crushed, because according to the testimony of Mr. Neilson he told him this, and exacted from the deceased a promise that he would not place his head or body between the ends of the cars. If the deceased placed his head between the ends of the cars without any necessity therefor, and it was crushed, the defendant cannot be held responsible for the accident. He was bound to exercise care according to the circumstances in which he was placed, and the dangers which he knew were incident thereto; and his failure to do so, and consequent injury, would bar any right of action against his employer
387 by reason of such injury.

The making of a coupling of this kind was not an every day occurrence. This was an extraordinary occasion, the transporting by the defendant of a shovel car as it came to it from the owner of the same. Therefore the deceased was left largely to his own selection of the manner of making it. As already stated, he was familiar with the duties of a brakeman and the coupling of cars, and it was his duty to make this particular coupling in the safest way suggested to him; and if he rejected that way of doing it and selected one of his own, manifestly dangerous and difficult, when a much safer one was equally manifest, and he was thereby injured, the defendant is not responsible, and your verdict should be in its favor.

Or if he was warned of the danger and told to keep down under the bottom of the shovel-car, that if he got between the ends of the cars he would be crushed; and he could have safely made the coupling by keeping down under the shovel car and without getting between the ends of the cars, and without any necessity thereof did put his head between the ends of the cars, and it was thereby crushed, his negligence in this particular would bar any right of action against the defendant company, and your verdict should be in its favor.

388 Now, gentlemen, you will take the case, and determine it according to the law and the evidence, which alone should guide you in its determination. It is unnecessary for me to caution you against permitting either sympathy, bias or prejudice intervening and perverting your judgment on the law and the evidence.

Before retirement of jury the plaintiff, by her attorney, excepts to the general charge of the court and to the answers by the court to the plaintiff's sixth, seventh and ninth points, and requests that the same be written out in long hand and filed. And at the request of the counsel for the plaintiff a bill of exceptions is sealed to the plaintiff by the court.

Before retirement of jury the defendant, by its attorneys, excepts to the general charge of the court and to the answers by the court to the plaintiff's first, second, third, fourth, sixth, eighth, ninth, tenth and eleventh points, and to the answers by the court to all the defendant's points; and request that the court direct the charge and points, with the answers thereto, filed of record in the case. And at the request of the counsel for the defendant a bill of exceptions is sealed to the defendant by the court.

The jury retired at 12:15 o'clock, P. M.

389 The following is a copy of the points of law presented by the defendant and which were refused by the court.

First. That under all the evidence and pleadings in this case, the verdict must be for the defendant.

Second. That Catherine Schlemmer, having married Patrick Craig on September 25, 1904, she then ceased to be the widow of Adam Schlemmer, deceased, within the meaning of the act of April 25, 1855, and became the wife of Patrick Craig, and there can be no recovery in this action.

Third. That Catherine Schlemmer having married Patrick Craig on September 25, 1904, she then ceased to be the widow of Adam Schlemmer, and thereby legally divested herself of all right to recover damages on account of the death of Adam Schlemmer, and there can be no recovery in this action.

Fourth. That there is no proof of any negligence on the part of the defendant in this cause.

Fifth. That the evidence in this case proves conclusively that Adam Schlemmer, deceased, after being duly warned and instructed, failed or neglected to keep his head at least as low as the bottom of the steam shovel; that this omission was the sole fault of the
390 decedent, and that said decedent was guilty of contributory negligence and there can be no recovery in this action.

Sixth. That the uncontradicted evidence establishes the fact that the coupling in question was of the simplest form used on railroads; that Adam Schlemmer was a man of experience in making couplings and knew the manner of making the same, and in addition thereto was duly warned and instructed as to the manner of making the coupling in question; that he failed to heed the warning, obey the instructions and exercise reasonable care in making said coupling, and was, therefore, guilty of contributory negligence and there can be no recovery in this case.

391 I hereby certify that the proceedings, evidence and charge are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

BUELL B. WHITEHILL,
Official Stenographer.

Brookville, Pa., February 12, 1908.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

JOHN W. REED,
President Judge.

Brookville, Pa., February 12, 1908.

392 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Whereas, lately in the Supreme Court of the State of Pennsylvania, before you, or some of you, in a cause between Catherine Schlemmer, appellant, and The Buffalo, Rochester & Pittsburgh Railway Company, appellee, wherein the judgment of the said Supreme Court, entered in said cause on the 9th day of November, A. D. 1903, is in the following words, viz:

"Nov. 9, 1903, Judgment affirmed. Per Curiam."

as by the inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and Six, the said cause
393 came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed with costs; and that the said appellant, Catherine Schlemmer, recover against the said appellee, One Hundred and fifty-six dollars and fifty cents for her costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court, March 4, 1907, and the same is hereby remanded to you the said Judges of the said Supreme Court of the State of Pennsylvania, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of April, in the year of our Lord
394 one thousand nine hundred and seven.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Costs of appellant:

Clerk	\$65.50
Printing Record	71.00
Attorney	20.00
	<hr/>
	\$156.50

395 Supreme Court of the United States, October Term, 1906.

Costs of Catherine Schlemmer in No. 41.

1905, October Term—Docketing cause and filing record,	
\$5.00; appearance, .25; filing præcipe and receipt, .50;	
filing papers, \$2.25; continuance, .25.....	\$8.25
1906, October Term—Transfer, \$1.00; appearance, .25;	
filing præcipes receipt, .50; filing papers \$2.00; filing	
briefs, \$5.00; argument, .20; judgment \$1.00; filing	
same, .25; recording, .40; mandate, \$5.00; preparing	
record for printer, etc. \$41.25; cost of printing record,	
\$71.00; attorney's docket fee, \$20.00; costs and copy, .40	148.25
	<hr/>
	\$156.50

Fee Book, page 19,794.

Test.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

396 File No. 19,794. Supreme Court of the United States. No. 41, October Term, 1906. Catherine Schlemmer vs. The Buffalo, Rochester & Pittsburgh Ry. Co. Mandate. Filed May 22, 1907. Supreme Court. W. D.

397 Oct., 1903.

No. 30.

SCHLEMMER

v.

BUFFALO, &c., R. R. Co.

In obedience to the mandate of the Supreme Court of the United States the order heretofore entered in this case is rescinded and the judgment of the Court of Common Pleas of Jefferson County is reversed and procedendo awarded, with directions to try the case upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of this court.

Per Curiam.

398 No. 30. October Term, 1903. Schlemmer v. Buffalo, Rochester and Pittsburgh Ry. Co. Order. Filed Jul- 25, 1907. Supreme Court. W. D.

399 In the Supreme Court of the State of Pennsylvania, October Term, 1903.

Appeal from Judgment of Court of Common Pleas of Jefferson County.

No. 30.

CATHERINE SCHLEMMER, Appellant,

v.

BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY, Appellee.

Motion to Amend Order Entered Herein July 25th, 1907.

Now comes the appellant, Catherine Schlemmer, by her attorney, of record, A. J. Truitt, and moves this Honorable Court to correct or amend the order entered in the above entitled cause on the 25th day of July, 1907, by striking therefrom the following, namely: "upon the settled principles of law as to contributory negligence as heretofore declared in the decisions of this Court" and to
400 insert in lieu thereof the following, namely; "in conformity with law," or the following, namely: "In conformity with the opinion of the Supreme Court of the United States filed in the above entitled cause, March 4, 1907," or the following, to wit: "in a manner not inconsistent with the principles announced in the decision of the Supreme Court of the United States filed in the above entitled cause, March 4, 1907, or the following to wit": in conformity with the judgment and decree of the Supreme Court of the United States, as according to right and justice and the constitution and laws of the United States ought to be had therein."

And as ground for said motion it is respectfully submitted that the direction to the court of Common Pleas of Jefferson County, "to try the case upon the settled principles of law as to contributory negligence as heretofore declared in the decisions of this court" is inconsistent with the principles of law declared in the opinion of the Supreme Court of the United States filed in the above entitled cause March 4th, 1907, and is contrary to the express terms of the mandate of the Supreme Court of the United States reversing the judgment of this Honorable Court and directing further proceedings
401 to be had in said cause in a manner "not inconsistent with the opinion of" said Supreme Court of the United States.

The appellant further moves this Honorable Court to correct or amend the order in the above entitled cause on the 25th day of July, 1907, by adding thereto the following; "that the said Catherine Schlemmer, plaintiff, have execution for her costs amounting to \$156.50, expended by her in this cause in prosecuting the writ of error to said Supreme Court of the United States." Also \$106 additional costs as taxed by the Proth'y of the Supreme Court of Pa. in Appeal to U. S. Supreme Court.

As ground for said further motion it is respectfully submitted that this Court should direct execution so that appellant may have

reimbursement for her costs expended in prosecuting this writ of error. Although frequent demand has been made upon the appellee, payment has been steadfastly refused.

A. J. TRUITT,
Attorney for Appellant.

Brief in Support of Said Motion.

The direction of this Honorable Court requiring the Court of Common Pleas of Jefferson County to try this case "upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of this Court" is tantamount to a declaration to said Court to disregard in the trial of said cause any contention based upon the provisions of the Act of Congress of March 2, 1893, Chapter 196, which may be submitted on behalf of the plaintiff and especially is tantamount to an instruction to the trial court to give no effect in the trial of the cause to the provisions of Section 8 of said statute, and to such extent at least is inconsistent with the declaration contained in the opinion of the Supreme Court of the United States in said cause to the effect that

"Assumption of risk in this broad sense obviously shades into negligence as commonly understood. * * * But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, *a matter upon which we express no opinion*, then, unless great care be taken, the servant's rights will be sacrificed by simply
403 charging him with assumption of the risk under another name."

And further is inconsistent with the declaration contained in said opinion of the Supreme Court of the United States to the following effect:

"But suppose the non-suit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of
404 opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer

did not assume, that to enforce the statute requires that the judgment should be reversed."

To confine the trial court in the re-trial of the present cause to determine the case solely "upon the settled principles of the law as to contributory negligence as heretofore declared in the decision of this court" is tantamount, under the circumstances disclosed by the evidence at the former trial of said cause, to an affirmative denial of any right on the part of the plaintiff to rely upon the exemption of Section 8 of the Act of March 2, 1893, concerning assumption of risk. And in support — our Motion, we further desire to call the attention of your Honorable Court to the following extracts from the Mandate of the U. S. Supreme Court to the Honorable, the Judges of the Supreme Court of the State of Pennsylvania, namely;—"And Whereas, in the present Term of October, A. D. 1906, the said cause came on to be heard before the Supreme Court of the United States

* * * On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed with costs; and that the said appellant, Catherine Schlemmer, recover against the said appellee \$156.50, for the costs herein expended and have execution therefor. And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings, not inconsistent with the opinion of this court. * * *

And the same is hereby remanded to you, the said judges of the said Supreme Court of the State of Pennsylvania, in order that said execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this court, above stated, as according to right and justice and the constitution and laws of the United States ought to be had therein, the said writ of error notwithstanding."

A. J. TRUITT,
Attorney for Appellant.

F. D. McKENNEY,
Of Counsel.

406 No. 30 October Term, 1903. In the Supreme Court of Penna. Catherine Schlemmer Appellant v. Buffalo, Rochester and Pittsburg Railway Company. Motion and Brief to Amend Order, entered July 25th, 1907. Filed October 15, 1907. Supreme Court, W. D. A. J. Truitt, Att'y for Appellant.

407 Oct., 1903, C. P. Jefferson.

No. 30.

SCHLEMMER

v.

BUFFALO, &c., R. W. Co.

Nov. 11, 1907, the order heretofore made, on July 25, 1907, is now supplemented by the further order, that the court below shall

issue execution on the præcipe of appellant, for her costs, as adjudged by the mandate of the Supreme Court of the United States and for her costs to the present time incurred in this court.

The petition for further amendment of the order of July 25th 1907 is denied.

Per Curiam, MITCHELL, C. J.

408 No. 30 October Term, 1903. Schlemmer v. Buffalo &- R.
W. Co. C. P. Jefferson. Filed Nov. 11, 1907 Supreme
Court, W. D.

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Docket Entries.

In the Supreme Court of Pennsylvania, Western District.

CATHARINE SCHLEMMER (now CATHARINE CRAIG), Appellant,
vs.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.
Appeal from Common Pleas, Jefferson County, at No. 194 of April
Term, 1901.

Appeal and affidavit filed and Writ exit June 26, 1908.

Aug. 21, 1908.—Assignment of error filed.

Sept. 30, 1908.—Record filed.

Oct. 5, 1908.—Motion to suppress appellee's paper book filed.

Oct. 8, 1908.—Argued.

January 4, 1909.—Judgment affirmed. Per Curiam.

Feb. 2, 1908.—Remitted.

March 10, 1909.—Præcipe for Supplemental Writ filed.

Eo Die, Supplemental Writ, as provided by Sec. 18, Act 19th
May 1897, P. L. 67, issued.

March 13, 1909.—Petition for Reargument filed.

Eo Die Petition for Writ of Error filed.

Also Assignments of Error filed.

April 26, 1909.—Reargument refused.

Eo Die Writ of Error refused.

410 In the Supreme Court of Pennsylvania for the Western District.

Court of Common Pleas, County of Jefferson.

No. 194 of April Term, 1901.

CATHARINE SCHLEMMER, now CATHARINE CRAIG,
v.

THE BUFFALO, ROCHESTER AND PITTSBURG RAILROAD COMPANY.

Enter Appeal on behalf of plaintiff from the judgment of the Court of Common Pleas of the County of Jefferson of June 5, 1908, in favor defendant.

A. J. TRUITT,
CHARLES CORBET,
Attorneys for Appellant.

To George Pearson, Prothonotary of The Supreme Court of Pennsylvania for the Western District.

COUNTY OF JEFFERSON, ss:

Catharine Craig, being duly sworn, saith that the above Appeal is not intended for delay, but because Appellant believes she has suffered injustice by the judgment from which she appeals.

MRS. CATHARINE CRAIG.

Sworn and subscribed before me this 23rd day of June, A. D. 1908.

N. D. COREY,

[SEAL.]

Justice of the Peace.

My Commission expires May 3rd, 1909.

411 [Endorsed:] No. 135. October Term, 1908. Supreme Court of Pennsylvania, Western District. Catharine Schlemmer, now Catharine Craig, v. Buffalo, Rochester and Pittsburg Railway Company. Appeal and Affidavit. Filed Jun- 26, 1908. Supreme Court, W. D. A. J. Truitt, Charles Corbet, Attorneys for Appellant.

412 THE SUPREME COURT OF PENNSYLVANIA,
Western District, County of Allegheny, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. — for the County of Jefferson, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Catharine Schlemmer, now Catharine Craig, from the judgment of your said Court, at No. 194 of April Term, A. D. 1901, wherein said Appellant is Plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant, before you, or some

of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the first Monday of October, 1908, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the twenty-sixth day of June in the year of our Lord one thousand nine hundred and eight.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON, *Prothonotary*.

413 [[Endorsed:] No. 194, April Term, 1901. No. 135 of October Term, 1908. Supreme Court. Catharine Schlemmer, now Catharine Craig, Appellant, vs. Buffalo, Rochester and Pittsburgh Railway Co. Certiorari to the Court of Common Pleas No. — for the County of Jefferson. Returnable the first Monday of October, A. D. 1908. Rule on the Appellee to appear and plead on the Return Day of the Writ. George Pearson, Prothonotary. Filed June 29, 1908. Notice of filing within accepted June 30, 1908. C. Z. Gordon Att'y for Def't. A. J. Truitt, Charles Corbet, Attorneys for Appellant.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

(Signed)

JOHN W. REED, [L. s.]
Pres't Judge. [L. s.]

414 In the Supreme Court of Pennsylvania, Western District.

No. 135, October Term, 1908.

CATHARINE SCHLEMMER, now CATHARINE CRAIG, Appellant,

v.

THE BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY.

Appeal by Plaintiff from the Judgment of the Court of Common Pleas of Jefferson County at No. 194 of April Term, 1901, entered N. O. V. June 5, 1908.

Appellant's Specification of Error.

Specification of Error.

The Court erred in entering judgment non obstante veredicto for defendant in this case.

Judgment for Defendant Non Obstante Veredicto.

And now, June 5, 1908, the rule for judgment non obstante veredicto is made absolute, and judgment upon the whole record is now entered in favor of the defendant.

By the Court,

JOHN W. REED,
President Judge.

415 *Exception and Bill.*

Same day the plaintiff excepts to the ruling and judgment of the court, and at her request bill of exception sealed.

JOHN W. REED, [SEAL.]
President Judge.

To George Pearson, Esq., Prothonotary.

A. J. TRUITT,
CHARLES CORBET,
Attorneys for Plaintiff.

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In the Supreme Court of Pennsylvania.

No. 135, October Term, 1908.

CATHERINE SCHLEMMER, now CATHERINE CRAIG, Appellant,

v.

THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Appeal by Plaintiff from the Judgment of the Court of C. P. of Jefferson County at No. 194 of Apr. T-r., 1901; Entered N. O. V. June 5, 1908.

To the Honorable the Chief Justice and the Associate Justices of said Supreme Court of Pennsylvania:

Whereas counsel for appellee in said appeal — above action to your Honorable Court as above set forth have set forth in their paper book on page 2 thereof the following, viz.:

“On April 20th, 1902, non-suit was entered in the Court of Common Pleas of Jefferson County. On January 19th, 1903, an appeal was taken to this court, and on November 19, 1903, the refusal of the Court to take off judgment of non-suit was affirmed (207 Pa. 198). This ended the case so far as the plaintiff was concerned. But the Federal Administration had passed the Safety Appliance Act and in 1905 to test its validity. It had to have a case
417 for such purpose and this case was selected. The Attorney General of the United States determined to intervene. The Secretary of the Interstate Commerce Commission, the author of the Safety Appliance Act was delegated to examine the case. The purse of the National Government was opened for the purpose, and an appeal was taken to the Supreme Court of the United States, although nearly two years had elapsed since the plaintiff had ceased to litigate. These facts were published along defendant's railroad and throughout Western Pennsylvania, as was fully shown at the argument of the rule to show cause why judgment should not be entered non obstante veredicto See Appendix).”

And whereas the Appendix thus referred to and incorporated in and made a part of the paper book of appellee consists of a newspaper article taken from the Pittsburg Dispatch of Monday, October 22, 1906.

Wherefore the plaintiff, appellant herein, now this 5th day of October A. D. 1908, comes before your Honorable Court by her attorney of record A. J. Truitt, and moves your Honorable Court to suppress said paper book of appellee on the grounds of falsification of the facts as shown by the record in this action and for the scandalous expressions contained in its said paper book and their immateriality and impertinence. There is not a scintilla of evi-
418 dence in this action as shown by the record to support the allegations as set forth in appellee's paper book and the misrepresentations of the facts contained therein and their sophistical presentation of argument only tend to precipitate a conflict between

the Supreme Court of the United States and your own Honorable Court, a situation which all good citizens having any regard for the integrity and perpetuity of our institutions may well deplore.

A. J. Truitt, plaintiff's counsel in presenting this motion sets forth that he has had full charge and control of plaintiff's case from its beginning; that it is untrue as alleged aforesaid in appellee's paper book that the affirmance by your Honorable Court of the refusal of the Court to take off the judgment of non-suit ended the case so far as the plaintiff was concerned; that immediately on said affirmation of said judgment by your Honorable Court on Nov. 9, 1903, plaintiff's said counsel proceeded and faithfully continued in his procedure to take an appeal to the Supreme Court of the U. S.; neither is it true that this case was selected to test the Safety Appliance Act; the case of *Johnson v. Southern Pacific Co.*, cited in appellant's paper book on pages 51 and 53 and reported in 196 U. S. 1 was a case fully testing said Safety Appliance Act and the opinion therein had much to do with the plaintiff's counsel appealing this action to the Supreme Court of the U. S.—the opinion in this case

i. e. *Johnson v. Southern Pacific Co.*, having been rendered
419 by the Supreme Court of the U. S. Dec. 19, 1904, long before plaintiff's appeal — this action to said higher court this opinion fully sustaining the validity — said Appliance Act; nor is it true that the Attorney General of the United States determined to intervene in this action; he never took any such action or any action whatever herein and so far as plaintiff's counsel can personally state and in so far as he has been reliably informed the said Attorney General of the U. S. while such Attorney General never heard tell of this action known as the Schlemmer case; nor is it true that the purse of the National Government was opened for the purpose of an appeal i. e. the appeal aforesaid of this action to the Supreme Court of the U. S.; this is not only false but contemptible; the expenditure of public monies is not made under a bushel and the facts as to this were easily ascertainable; nor was the Secretary of the Interstate Commerce Commission delegated to examine the case; the truth is plaintiff's counsel requested him to assist in obtaining a determination by the Supreme Court of the U. S. of what he believed to be a Federal question which legitimately came within his province and in which he was fully justified; nor is it true that said appeal to U. S. Supreme Court was taken although nearly two years had

elapsed since the plaintiff had ceased to litigate; plaintiff and
420 her said counsel have during all the years of this legal battle in this action been endeavoring to secure her legal rights as they view this case to the best of their ability and had not ceased therein prior to said appeal or since; as to the newspaper article which is made an Appendix to appellee's paper book it is unjust, unfair and all wrong to drag it into this controversy and certainly counsel for appellee know this, and it has no part or place in the record.

Plaintiff's counsel feels such deliberate action on part — appellee and its counsel should not go unchallenged, at the same time fully realizing that your Honorable Court may of its own motion sup-

press appellee's paper book for the said offenses, nevertheless plaintiff's counsel makes this motion for the suppression — the said paper book of appellee for the reasons above set forth.

A. J. TRUITT,
Attorney for Appellee.

421 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania do hereby certify that the motion to suppress paper book of appellee in re Schlemmer v. Buffalo, Rochester & Pittsburgh Railway Company, a copy of which is hereto attached and made a part of this record, was duly presented in the Supreme Court on October 5th, 1908, and filed therein.

I further certify that no order of court thereon appears of record but that the question involved in the said case was decided without reference to the said motion to suppress.

Witness my hand and the seal of said court this 11th day of May, 1909.

[Seal of the Supreme Court of Pennsylvania, Western District.
1776.]

GEO. PEARSON,
Prothonotary.

422 In the Supreme Court of Pennsylvania, Western District.

No. 135, October Term, 1908.

SCHLEMMER

vs.

BUFFALO, &c., R. R.

Appeal from C. P. Jefferson County.

Filed January 4, 1909.

Per CURIAM:

It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence either greater or less than his own, of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head though twice expressly cautioned at the time as to the danger of so doing.

Judgment affirmed.

423 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, set:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Schlemmer vs. Buffalo, Rochester & Pittsburgh Railway Company at No. 135 October Term, 1908, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 14th day of January in the year of our Lord One Thousand Nine Hundred and nine.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

424 [Endorsed:] No. 194, April Term, 1901. No. 135 October Term, 1908. Schlemmer vs. Buffalo, Rochester & Pittsburgh Railway Company. Exemplification. Filed Feb. 3, 1909.

425 THE SUPREME COURT OF PENNSYLVANIA,
Western District, County of Allegheny, ss:

The Commonwealth of Pennsylvania to the judges of the Court of Common Pleas No — for the County of Jefferson, Greeting:

Whereas, By virtue of our Writ of Certiorari to No. 135 of October Term 1908, of our Court, a record in the matter of the appeal of Catharine Schlemmer, now Catharine Craig from the judgment of your said Court at No. 194 of April Term 1901, was brought into our said Court, and the said cause was there so proceeded in that on the 4th day of January A. D. 1909, the following decision was rendered, viz:

Judgment affirmed.

Per CURIAM.

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Supreme Court as aforesaid.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the fourteenth day

of January in the year of our Lord one thousand nine hundred and nine.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEO. PEARSON,
Prothonotary.

426 [Endorsed:] No. 194 April Term, 1901. No. 135 October Term, 1908. Supreme Court. Schlemmer vs. Buffalo, Rochester & Pittsburgh Ry. Co. Remittitur. Filed Feb'y 3rd, 1909. Costs, attorney, \$3.

427 In the Supreme Court of Pennsylvania for the Western District.

Court of —, County of Jefferson.

No. 194, April Term, 1901.

CATHERINE SCHLEMMER now CATHERINE CRAIG, Appellant,
v.
THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Supplemental Certiorari.

Issue Certiorari to the Court of Common Pleas No. — of the County of Jefferson to remove the record and proceedings in a certain action in the said Court at above number and term between the parties hereinbefore recited. The record aforesaid being required by the Supreme Court for further proceedings therein, as provided by Section 18 of the Act approved 19 May, 1897, P. L. 67.

A. J. TRUITT,
*Attorney for Catherine Schlemmer, now
Catherine Craig, Plaintiff.*

To George Pearson, Prothonotary Supreme Court, Western District.

428 [Endorsed:] No. 135, October Term, 1908. Supreme Court of Pennsylvania, Western District. Catherine Schlemmer (now Catherine Craig), Appellant vs. The Buffalo, Rochester and Pittsburgh Railway Company. Præcipe for certiorari. Filed Mar. 10, 1909. Supreme Court, W. D. A. J. Truitt, Attorney for Appellant.

429 THE SUPREME COURT OF PENNSYLVANIA,
Western District, County of Allegheny, ss:

Supplemental Certiorari, as Provided by Section 18 of the Act Approved 19th May, 1897, P. L., 67.

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. — for the County of Jefferson, Greeting:

We being willing for certain further proceedings in the Supreme Court in the matter of appeal of Catharine Schlemmer from the judgment of your said Court, at No. 194 of April Term, A. D. 1901, wherein said Appellant is Plaintiff and The Buffalo, Rochester and Pittsburgh Railway Company is Defendant, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, forthwith, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought, as provided in section 18 of Act approved 19 May, 1897, P. L. 67.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the thirteenth day of March in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEO. PEARSON,
Prothonotary.

430 [Endorsed:] No. 194 April Term, 1901. No. 30 of October Term, 1903. Supreme Court. Catharine Schlemmer, Appellant, vs. The Buffalo, Rochester and Pittsburgh Ry. Co. Supplemental Certiorari to the Court of Common Pleas No. — for the County of Jefferson. Returnable forthwith. Rule on the Appellee to appear and plead on the Return Day of the Writ. George Pearson, Prothonotary. Filed March 14, 1905. Jenks & Corbet, J. G. Wingert, A. J. Truitt, Attorneys for Appellant.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send as within we are commanded.

— — — [L. s.]
— — — [L. s.]

431 In the Supreme Court of Pennsylvania, Western District.
No. 135, October Term, 1908.

CATHERINE SCHLEMMER, NOW CATHERINE CRAIG, Appellant,
v.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Appeal by Plaintiff from the Judgment of the Court of Common
Pleas of Jefferson County, at No. 194, of April Term, 1901, En-
tered N. O. V., June 5th, 1908.

Action of Trespass.

Motion for Reargument.

To the Honorable the Chief Justice and Associate Justices of the
Supreme Court of Pennsylvania:

Mrs. Catherine Schlemmer, now Catherine Craig, plaintiff in error
and appellant, by her attorney, moves your Honorable Court to
grant a reargument in the above case.

A certified copy of the opinion is hereto attached and made a
part hereof.

A. J. TRUITT,
Attorney for Appellant.

432 In the Supreme Court of Pennsylvania, Western District
No. 135, October Term, 1908.

SCHLEMMER
vs.
BUFFALO, &c., R. R.

Appeal from C. P., Jefferson County.

Filed January 4, 1909.

Per Curiam:

It is the settled law of Pennsylvania that any negligence of a party
injured, which contributed to his injury, bars his recovery of dam-
ages without regard to the negligence either greater or less than his
own, of the other party. The present is a clear case of contributory
negligence within this rule. The evidence is indisputable that the
unfortunate decedent not only attempted to make the coupling in a
dangerous way when his attention was directly called to a safer way,
but also did it with reckless disregard of his personal safety by rais-
ing his head though twice expressly cautioned at the time as to the
danger of so doing.

Judgment affirmed.

433 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, *scd*:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Opinion in the case of Schlemmer vs. Buffalo, Rochester & Pittsburgh Ry. Co. at No. 135 October Term, 1908, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this thirtieth day of March, in the year of our Lord One Thousand Nine Hundred and Nine.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary.

434 [Endorsed:] No. 135. October Term, 1908. Schlemmer vs. Buffalo, Rochester & Pittsburgh Ry. Co. Exemption.

435 In the Supreme Court of Penna. No. 135, October Term, 1908. Catherine Schlemmer, now Catherine Craig, appellant, v. The Buffalo, Rochester & Pittsburgh Railway Company. April 26/09. Reargument refused. P. C. Motion for reargument. Filed March 13, 1909. Supreme Court, W. D.

436 In the Supreme Court of Pennsylvania, Western District.
No. 135, October Term, 1908.

CATHERINE SCHLEMMER, NOW CATHERINE CRAIG, Appellant,

v.

THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Appeal by Plaintiff from the Judgment of the Court of Common Pleas of Jefferson County, at No. 194, of April Term, 1901, Entered N. O. V., June 5th, 1908.

Action of Trespass.

Petition for Writ of Error.

Considering herself aggrieved by the final decision of the Supreme Court of Pennsylvania in rendering judgment against her in

the above entitled case, the plaintiff hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States.

Assignment of errors herewith.

A. J. TRUITT,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,
Supreme Court, ss:

437 April 26, 1909.—No question was involved or determined in this case except that of contributory negligence under the law of Pennsylvania. No Federal question being involved a writ of error is refused.

MITCHELL,
Chief Justice.

438 In the Supreme Court of Pennsylvania, Western District.
No. 135, of October Term, 1908.

CATHERINE SCHLEMMER, NOW CATHERINE CRAIG, Appellant,
v.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Appeal by Plaintiff from the Judgment of the Court of Common Pleas of Jefferson County, at No. 194, of April Term, 1901, Entered N. O. V., June 5th, 1908.

Action of Trespass.

Assignment of Errors.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

Now comes Catherine Schlemmer, now Catherine Craig, Plaintiff in Error and Appellant, in above action, by her attorney, and files herewith her petition for a Writ of Error, and says that there
439 are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

The Supreme Court of Pennsylvania erred in affirming the judgment non obstante veredicto for defendant in this case. Said judgment of the lower court being as follows:

"And now, June 5, 1908, the rule for judgment non obstante veredicto is made absolute, and judgment upon the whole record is now entered in favor of the defendant.

By the Court,

JOHN W. REED,
President Judge."

The affirmance thereof by the Honorable Supreme Court of Pennsylvania being as follows:

"Per Curiam: * * * Judgment affirmed."

The said errors are more particularly set forth as follows:

The Honorable Supreme Court of Pennsylvania erred in holding and deciding:

First. In holding in its opinion deciding this action that the following well known principle of Pennsylvania Law applies to this action, viz:

"It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence either greater or less than his own, of the other party;"—as this action is controlled by and to be decided by the well known principle of law as laid down by the highest Federal Courts, viz:

"There is another qualification of the rule of negligence, which it is proper that I should mention. Although the rule is that, even if the defendant be shown to be guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do with causing the accident; yet, the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."

The facts show plaintiff's decedent who lost his life Aug. 5, 1900—the damages for which this action was instituted—was then in employ of defendant, an interstate railroad, and decedent was attempting to couple a car not equipped with an automatic coupler as required by the Federal Statute of March 2, 1893—a copy thereof being in paper book of plaintiff and made a part hereof. The facts further clearly show defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of decedent's negligence if any appears which is denied.

441 When this Federal Statute—which has been made a part of plaintiff's statement and offered in evidence in the trial of this action on part of plaintiff—shall apply or be defeated, its construction, validity, constitutionality, application and interpretation, are questions to be decided by the decisions of the Federal Courts—those of the enacting sovereignty. If by the decisions of the courts of the several states we will have legal chaos.

Second. In holding in its opinion deciding this action that "The present is a clear case of contributory negligence within this rule." The jury by its verdict in favor of the plaintiff found as a fact that plaintiff's decedent was entirely free from any contributory negligence whatever on his part.

Third. In not deciding that decedent's attempt to make the coupling was wholly one of assumption of risk from which he was fully absolved by the statute. And decedent being thus exonerated by the statute defendant is also deprived of the defense of contributory negligence, if any.

Fourth. In not deciding that the receipt of the car and its transportation by the defendant in its unlawful and dangerous condition was gross or willful negligence, to which the defense of contributory negligence cannot be applied.

442 Fifth. In not deciding that contributory negligence, if any, cannot be pleaded as a bar to plaintiff when the proximate cause of decedent's injury was the failure of defendant to comply with the Statute.

Sixth. In not deciding that after the enactment of the United States Statute—which is relied upon by the plaintiff as the law governing this action—it was exclusive to the extent of the subjects covered by it and among which is that of the coupling and couplers of cars on interstate railroads engaged in interstate traffic such as the evidence showed the car herein was. And that the local police law which prior to the enactment the statute governed those subjects in so far as it is in conflict with the provisions of the statute gave way and was superceded by it.

Seventh. In not deciding that the proximate cause of decedent's injuries and decease was defendant's negligence in its violation of the U. S. Statute in failing to equip the car with an automatic coupling.

Eighth. In not deciding that it was defendant's duty to use automatic couplers on the car which injured decedent, and its
443 failure so to do causing decedent's injuries, is a continuing negligence on part defendant, which cuts off the defense of contributory negligence, if any.

Ninth. In not enforcing and making of primary importance in this action the provisions of the Federal Statute—particularly sections two and eight thereof.

Tenth. In not reversing the judgment non obstante veredicto of the lower Court in favor of defendant and entering judgment on the verdict in favor of plaintiff.

For which errors plaintiff prays that the judgment of the said Supreme Court of Pennsylvania, dated January 4th, A. D. 1909, be reversed, and a judgment be entered in favor of the plaintiff on the verdict for the amount thereof, with interest and all costs.

A. J. TRUITT,

Attorney for Catherine Schlemmer, Now Catherine Craig.

444 In the Supreme Court of Penna. No. 135, October Term, 1908. Catherine Schlemmer, now Catherine Craig, Appellant, v. The Buffalo Rochester & Pittsburg Railway Company. Petition for writ of error, also assignment of errors. Filed Mar. 13, 1909. Supreme Court, W. D.

445 & 446 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, sct:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Record in the case of Catherine

Schlemmer now Catherine Craig vs. The Buffalo, Rochester & Pittsburgh Railway Company at No. 135 October Term, 1908, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this thirteenth day of May in the year of our Lord One Thousand Nine Hundred and nine.

[Seal of the Supreme Court of Pennsylvania, Western District. 1776.]

GEORGE PEARSON,
Prothonotary.

447 In the Supreme Court of Pennsylvania, Western District.

No. 135 of October Term, 1908.

CATHERINE SCHLEMMER, now CATHERINE CRAIG, Appellant,
v.

THE BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Action of Trespass.

Appeal by Plaintiff from the Judgment of the Court of Common Pleas of Jefferson County at No. 194 of April Term, 1901, Entered N. O. V. June 5th, 1908.

Petition for Writ of Error.

Considering herself aggrieved by the final decision of the Supreme Court of Pennsylvania in rendering judgment against her in the above entitled case, the plaintiff hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States.

Assignment of errors herewith.

A. J. TRUITT,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,

Supreme Court, ss:

APRIL 26, 1909.

No question was involved or determined in this case except that of contributory negligence under the law of Pennsylvania. No Federal question being involved a writ of error is refused.

MITCHELL,
Chief Justice.

448 In the Supreme Court of Pennsylvania, Western District.

No. 135 of October Term, 1908.

CATHERINE SCHLEMMER, now CATHERINE CRAIG, Appellant,
v.
THE BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

Action of Trespass.

Appeal by Plaintiff from the Judgment of the Court of Common Pleas of Jefferson County at No. 194 of April Term, 1901, Entered N. O. V. June 5th, 1908.

Assignment of Errors.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

Now comes Catherine Schlemmer, now Catherine Craig, Plaintiff in Error and Appellant, in above action, by her attorney, and files herewith her Petition for a Writ of Error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

The Supreme Court of Pennsylvania erred in affirming the judgment *non obstante veredicto* for defendant in this case. Said judgment of the lower Court being as follows:

"And now, June 5, 1908, the rule for judgment *non obstante veredicto* is made absolute, and judgment upon the whole record is now entered in favor of the defendant.

By the Court.

JOHN W. REED,
President Judge."

The affirmance thereof by the Honorable Supreme Court of Pennsylvania being as follows:

"Per CURIAM:

* * * Judgment Affirmed."

449 The said errors are more particularly set forth as follows:
The Honorable Supreme Court of Pennsylvania erred in holding and deciding:

First. In holding in its opinion deciding this action that the following well known principle of Pennsylvania law applies to this action, viz: "It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence either greater or less than his own, of the other party;"—as this action is controlled by

and to be decided by the well known principle of law as laid down by the highest Federal Courts, viz:

"There is another qualification of the rule of negligence, which it is proper that I should mention. Although the rule is that, even if the defendant be shown to be guilty of negligence, the plaintiff cannot recover if he himself *by* shown to have been guilty of contributory negligence which may have had something to do with causing the accident; yet, the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."

The facts show plaintiff's decedent who lost his life Aug. 5, 1900—the damages for which this action was instituted—was then in employ — defendant, an interstate railroad, and decedent was attempting to couple a car not equipped with an automatic coupler as required by the Federal Statute of March 2, 1893—a copy thereof being in paper book of plaintiff and made a part hereof. The facts further clearly show defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of decedent's negligence if any appears which is denied.

When this Federal Statute—which has been made a part of plaintiff's statement and offered in evidence in the trial — this action on part of plaintiff—shall apply or be defeated, its construction, validity, constitutionality, application and interpretation, are questions to be decided by the decisions of the Federal courts—those of the enacting sovereignty. If by the decisions of the Courts of the several states we will have legal chaos.

Second. In holding in its opinion deciding this action that "The present is a clear case of contributory negligence within this rule." The jury by its verdict in favor of the plaintiff found as a fact that plaintiff's decedent was entirely free from any contributory negligence whatever on his part.

Third. In not deciding that decedent's attempt to make the coupling was wholly one of assumption of risk from which he was fully absolved by the Statute. And decedent being thus exonerated by the Statute defendant is also deprived of the defense of contributory negligence, if any.

Fourth. In not deciding that the receipt of the car and its transportation by the defendant in its unlawful and dangerous condition was gross or willful negligence, to which the defense of contributory negligence cannot be applied.

Fifth. In not deciding that contributory negligence, if
450 any, cannot be pleaded as a bar to plaintiff when the proximate cause of decedent's injury was the failure of defendant to comply with the Statute.

Sixth. In not deciding that after the enactment of the United States Statute—which is relied upon by the plaintiff as the law governing this action—it was exclusive to the extent of the subjects covered by it and among which is that of the coupling and couplers of cars on interstate railroads engaged in interstate traffic such as the evidence showed the car herein was. And that the local police law

which prior to the enactment — the Statute governed those subjects in so far as it is in conflict with the provisions of the Statute gave way and was superseded by it.

Seventh. In not deciding that the proximate cause of decedent's injuries and decease was defendant's negligence in its violation of the U. S. Statute in failing to equip the car with an automatic coupling.

Eighth. In not deciding that it was defendant's duty to use automatic couplers on the car which injured decedent, and its failure so to do causing decedent's injuries, is a continuing negligence on part — defendant, which cuts off the defense of contributory negligence, if any.

Ninth. In not enforcing and making of primary importance in this action the provisions of the Federal Statute—particularly sections two and eight thereof.

Tenth. In not reversing the judgment *non obstante veredicto* of the lower Court in favor of the defendant and entering judgment on the verdict in favor of plaintiff.

For which errors plaintiff prays that the judgment of the said Supreme Court of Pennsylvania, dated January 4th, A. D. 1909, be reversed, and a judgment be entered in favor of the plaintiff on the verdict for the amount thereof, with interest and all costs.

A. J. TRUITT,

*Attorney for Catherine Schlemmer,
now Catherine Craig.*

451 [Endorsed:] In the Supreme Court of Penna. No. 135 October term 1908. Catherine Schlemmer, now Catherine Craig, Appellant, vs. The Buffalo Rochester & Pittsburgh Railway Company. Petition for Writ of Error. Also Assignment of errors. Filed Mar. 13, 1909. Supreme Court, W. D.

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"Duplicate."

Know all men by these presents, that we, Catharine Schlemmer (now Catharine Craig), as principal, and American Surety Company of New York City, New York, as sureties, are held and firmly bound unto The Buffalo, Rochester & Pittsburgh Railway Company in the full and just sum of Five Hundred dollars, to be paid to the said The Buffalo, Rochester & Pittsburgh Railway Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of November, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a term of the Supreme Court of Pennsylvania in a suit depending in said Court, between Catharine Schlemmer (now Craig) plaintiff and appellant and The Buffalo, Rochester & Pittsburgh Railway Company appellee, a judgment was rendered against the said Catharine Schlemmer (now Craig) and the said Catharine Schlemmer (now Craig) having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to

reverse the judgment in the aforesaid suit, and a citation directed to the said The Buffalo, Rochester & Pittsburgh Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Catharine Schlemmer (now Craig) shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void: else to remain in full force and virtue.

CATHERINE CRAIG. [SEAL.]
 AMERICAN SURETY COMPANY OF
 NEW YORK, [SEAL.]
 By H. E. [Illegible]. [SEAL.]
Resident Vice-President.

Attest:

[Seal American Surety Company, New York.]

CLAUDE B. BROWN,
Resident Assistant Secretary.

Sealed and delivered in presence of—

A. J. TRUITT,
 M. D. JUDD.

Approved by—

(Signed) O. W. HOLMES,
*Associate Justice of the Supreme
 Court of the United States.*

“Duplicate.”

[Endorsed:] Copy.

453 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Catherine Schlemmer, now Catherine Craig, appellant, and The Buffalo, Rochester & Pittsburgh Railway Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws

of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
454 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of November, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

OLIVER WENDELL HOLMES,

*Associate Justice of the Supreme
Court of the United States.*

455 UNITED STATES OF AMERICA, ss:

To The Buffalo, Rochester & Pittsburgh Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein Catherine Schlemmer, now Catherine Craig, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this eleventh day of November, in the year of our Lord one thousand nine hundred and nine.

OLIVER WENDELL HOLMES,

*Associate Justice of the Supreme Court
of the United States.*

456 STATE OF PENNSYLVANIA,
County of Jefferson, ss:

On this 23rd day of November, in the year of our Lord one thousand nine hundred and nine, personally appeared A. J. Truitt before me, the subscriber, Prothonotary of the Court of Common Pleas of Jefferson County, State of Pennsylvania, and makes oath that he delivered a true copy of the within citation to Cadmus Z. Gordon, Esq., Attorney for The Buffalo, Rochester and Pittsburgh Railway Company the within named defendant, in within action.

A. J. TRUITT.

Sworn to and subscribed the 23rd day of November, A. D. 1909.

[Seal Court of Common Pleas, Jefferson Co., Pa.]

BLAKE E. IRVIN,
Prothonotary.

457 UNITED STATES OF AMERICA,
Supreme Court of Pennsylvania, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Supreme Court in the City of Pittsburgh this twenty-fourth day of November, 1909.

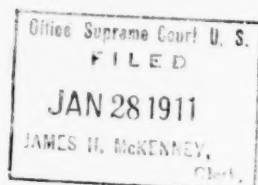
[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEORGE PEARSON,
Prothonotary of the Supreme Court of Pennsylvania.

Costs of Suit.

Costs of Transcript paid by the plaintiff..... \$256.00

Endorsed on cover: File No. 21,913. Pennsylvania Supreme Court. Term No. 687. Catherine Schlemmer, now Catherine Craig, plaintiff in error, vs. The Buffalo, Rochester & Pittsburgh Railway Company. Filed November 29th, 1909. File No. 21,913.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 374.

CATHERINE SCHLEMMER, Now CATHERINE
CRAIG, PLAINTIFF IN ERROR,

vs.

THE BUFFALO, ROCHESTER & PITTSBURGH
RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

MOTION TO ADVANCE.

Now comes the plaintiff in error, by her attorney of record, Frederic D. McKenney, and moves this honorable court to advance the above-entitled cause and assign the same for argument at an early day; and as ground for said motion respectfully shows to this hon-

orable court that said cause has heretofore been adjudicated by this court upon its merits (205 U. S., 1), and has again been brought before the court by writ of error, by reason whereof it falls within the purview and provisions of paragraph 4 of Rule 26 of the Rules of Practice of this honorable court.

It is respectfully suggested for the consideration of the court that if the convenience of the court will permit the setting of this case for argument March ^{13th} next, or at any subsequent day of the present term, such course would meet the desires and serve the convenience of the respective counsel of record in the cause.

FREDERIC D. McKENNEY,
Attorney for Plaintiff in Error.

**NOTICE OF INTENTION TO SUBMIT MOTION TO
ADVANCE.**

To Messrs.

C. H. McCauley,

C. Z. Gordon,

Martin E. Olmsted,

*Attorneys for The Buffalo, Rochester &
Pittsburgh Railway Company,*

Defendant in Error:

Please take notice that the above motion to advance for early argument the case of Catherine Schlemmer, now Catherine Craig, *vs.* The Buffalo, Rochester & Pittsburgh Railway Company will be submitted to the Supreme Court of the United States on Monday next, the 30th day of January, A. D. 1911, at 12 o'clock, or as soon thereafter as counsel may be heard.

F. D. McKENNEY,

Attorney for Catherine Craig.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 374.

CATHERINE SCHLEMMER, NOW CATHER-
INE CRAIG, PLAINTIFF IN ERROR,

v's.

THE BUFFALO, ROCHESTER & PITTS-
BURGH RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

Preliminary Statement.

This is an action brought by Catherine Schlemmer (summons issued March 20, 1901, R., 1.), who subsequently, on September 25, 1904, and while the action was still pending, married one Craig (R., 18, 120), to recover damages for the death of her

intestate and former husband, Adam M. Schlemmer, who at the time of the fatal injury was a brakeman in the employ of the defendant, The Buffalo, Rochester and Pittsburgh Railway Company. While endeavoring to make a coupling under the direct orders of his immediate superior, between a "shovel-car" and a caboose, both employed and moving in interstate commerce, his head was caught between the vehicles and so badly crushed that death quickly ensued.

The "shovel-car," which was part of a train of seventeen (17) cars, containing a contractor's outfit, on its way through Pennsylvania from a point in the State of New York, was not equipped with an automatic coupler as required by the act of March 2, 1893, ch. 196 (27 Stats. L., 531), commonly called the Safety Appliance Law.

The Federal question of prime consequence presented by the record arises from the action of the trial court, affirmed by the State Supreme Court with respect to the construction and application, in the circumstances disclosed by the evidence, of the provisions of the 8th section of said act, which reads as follows:

"SEC. 8. That any employee of any such common carrier (*i. e.*, engaged in interstate commerce by railroad) who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in

the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The case itself has heretofore had the attention of this court (*Schlemmer vs. Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S., 1), and the then judgment of the Supreme Court of Pennsylvania, which had affirmed a judgment of the trial court in favor of the Railway Company "on the ground of the deceased's contributory negligence," was reversed "and the cause remanded" for further proceedings not inconsistent with the opinion of * * * and "in conformity with the judgment and decree of this court * * * as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein" (R., 163).

The mandate of this court was filed in the State Supreme Court May 22, 1907. That court withheld action thereon until July 25, 1907, on which date it entered an order rescinding its former judgment and reversing the judgment of the trial court, and remanded the case to the latter court "with directions to try the case upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of this (the State Supreme) court" (R., 164).

Attorneys for plaintiff *Schlemmer* thereupon moved the Supreme Court of Pennsylvania to amend its judgment and remittitur by striking out

the clause above quoted, on the ground that the direction so given to the trial court was "inconsistent with the principles of law declared in the opinion of the Supreme Court of the United States filed in the above-entitled cause March 4, 1907, and is contrary to the express terms of the mandate of the Supreme Court of the United States reversing the decree of" the State Supreme Court "and directing further proceedings to be had in said cause in a manner 'not inconsistent with the opinion of' said Supreme Court of the United States" (R., 165).

In support of said motion counsel filed a short brief, which is set forth in full at pages 166 and 167 of the record, wherein, among other short points, it was argued that—

"To confine the trial court in the retrial of the present cause to determine the case solely 'upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of this (Pennsylvania Supreme) court' is tantamount, under the circumstances disclosed by the evidence at the former trial of said cause, to an affirmative denial of any right on the part of the plaintiff to rely upon the exemption of section 8 of the act of March 2, 1893, concerning assumption of risk" (R., 167).

The motion in this respect was denied (R., 168) and the cause was duly remitted to the Court of Common Pleas of Jefferson County with the ob-

jectionable direction to try the same "upon the settled principles of the law as to contributory negligence as heretofore declared in the decisions of" the Supreme Court of Pennsylvania (R., 16).

Prior to the coming on of the case for such retrial plaintiff moved the trial court to amend the title of the cause so that her then married name, viz., Catherine Craig, might appear therein, and this was granted (R., 18).

Plaintiff by leave of court also amended her "Statement of Claim" by adding to the words "said coupler was not a legal coupler or coupling as required by existing laws, on date of decedent's death, viz., August 5, 1900," the words "as it violated the provisions of the statute of the United States relating to safety couplers, * * * approved March 2, 1893, by the 52d Congress, second session, chapter 196, and which is especially pleaded as part of said existing laws" (R., 21, 37).

The case was thereupon tried to a jury, which in due course returned its verdict for plaintiff Schlemmer-Craig in the sum of \$10,000 (R., 26).

In submitting the case to the jury the learned trial judge reserved "for future consideration, should the verdict of the jury make this necessary," * * * "the questions of law and also the question of whether the evidence regarding the contributory negligence of the deceased is sufficient to warrant the submission of this question to the jury" (R., 160).

Immediately upon the entry of the verdict in favor of the plaintiff, the attorneys for defendant moved the court "for judgment for defendant *non obstante veredicto* upon the whole record," and also for an order directing "all the evidence taken upon the trial (to) be duly certified and filed so as to become a part of the record" (R., 26, 27).

On the same day the trial court noted defendant's exception to the verdict; sealed a bill of exceptions in its favor; ordered and decreed that all evidence taken upon the trial be duly certified and filed and made a part of the record, and granted a rule to show cause "why judgment should not be entered *non obstante veredicto*" (R., 28).

Upon consideration of said rule the learned trial judge declared himself to be of opinion that—

"The testimony does not warrant the conclusion that, in making this coupling, the risk was so obvious and the danger so imminent, that an ordinarily careful and prudent brakeman would not attempt it, as (and so) to fix the deceased with negligence on this ground. But it forces the conclusion that he was guilty of negligence in two particulars: First, in failing to exercise care according to the circumstances in making the coupling in the way he attempted to make it, and, second, in not adopting the safer way pointed out to him for making the same" (R., 32).

* * * * *

"The deceased, in the face of repeated warnings to keep down, and to be careful not to get caught between the ends of the cars, took a position which it was not necessary for him to take and which exposed him to the very danger against which he was warned. He took hold of the caboose with one hand and of the draw-bar on the shovel car with the other hand, and thus negligently and unnecessarily put himself in a position that if he raised up above the bottom of the cars he would be caught between the ends of the same.

"In this he was guilty of negligence contributing to his injury, which, under the settled law of this State, bars a recovery for damages on account of such injury. In the second place he was told * * * that the safe way to make it (the coupling) was by pushing the caboose up by hand against the shovel-car. This method of making the coupling was unquestionably the safer way to make it, and inasmuch as the deceased had the necessary assistance at hand to make it in this way, it was his duty to pursue the safer course, and a failure to do so fixes him with such negligence as bars a recovery. * * * The question of assumption of risk is injected into this case without any evidence to support it (R., 33). The risk of injury which the deceased took in this case was not involved in his contract of employment. * * * Conceding that it was his duty to make this coupling, it was equally his duty to exercise ordinary care and prudence in its performance. In this latter duty he utterly failed, and without any necessity therefor exposed himself to a risk and danger that was imminent,

which by the exercise of ordinary care and prudence he could have and should have avoided, and because he did not do so was injured. This certainly is negligence, and is clearly distinguishable from assumption of risk, or a risk necessarily incident to the employment in which he was engaged (R., 34).

“Upon the trial of this cause I was persuaded that the negligence of the deceased contributing to his injury was so manifest that a verdict for the plaintiff could not be sustained. * * * Further careful consideration of the testimony has confirmed the (that) conviction * * * and therefore I am constrained to enter judgment on it for the defendant, notwithstanding the verdict rendered in favor of the plaintiff” (R., 35).

The rule for judgment *non obstante veredicto* was accordingly “made absolute, and judgment upon the whole record is now entered in favor of the defendant” (R., 35).

Plaintiff promptly excepted to this ruling, and judgment of the court and bill of exceptions was signed accordingly (R., 35, 171).

To review the judgment so entered plaintiff appealed to the Supreme Court of Pennsylvania, specifying as error the entry of “judgment *non obstante veredicto* for defendant in this case” (R., 171).

Upon consideration the Supreme Court of Pennsylvania affirmed the judgment *non obstante veredicto* of the trial court, saying:

“Per Curiam: It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence, either greater or less than his own, of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head though twice expressly cautioned at the time as to the danger of so doing” (R., 178).

To review this judgment of the State Supreme Court attorneys for plaintiff petitioned for the allowance of a writ of error from this court (R., 179), assigning as reversible errors, among others:

1. The refusal of the Supreme Court of Pennsylvania to recognize and hold that as this action to recover damages for loss of life occurred in the course of an attempt on the part of an employee of an interstate carrier by railroad to couple a car not equipped “as required by the Federal statute of March 2, 1893,” the rules of the Federal courts with respect to negligence and contributory negligence should control.

2. In not deciding that decedent's attempt to make the coupling was wholly within the doctrine of assumption of risk from which he was fully absolved by the statute.

3. In not deciding that the receipt and transportation by the defendant of the shovel-car in its unlawful and dangerous condition was gross negligence, to offset which the defense of contributory negligence could not be applied.

4. In not deciding that the proximate cause of decedent's injury and consequent death was defendant's negligence, and the attendant violation of the Federal statute in failing to equip the shovel-car with an automatic coupler, and such negligence being of a continuing character "cuts off the defense of contributory negligence, if any."

5. In not enforcing in the action sections 2 and 8 of the Federal statute.

6. In not reversing the judgment *non obstante veredicto* in favor of defendant, and entering judgment on the verdict in favor of plaintiff (R., 181, 182).

On consideration of this application for allowance of a writ of error, the Chief Justice of the Supreme Court of Pennsylvania refused the same, stating that—

"No question was involved or determined in this case except that of contributory negligence under the law of Pennsylvania" (R., 180).

Subsequently, on further application, the desired writ of error was allowed by an associate justice of this Honorable Court (R., 188) and same having been duly perfected, the case comes now before this court for hearing and decision.

The Former Opinion of this Court.

With a single exception, fancied rather than real, to which we will advert later, the evidence on the former trial and that adduced at the second trial differed in no substantial degree or essential particular. In so far as precisely applicable to the present record, it is assumed that the opinion and judgment of this court on the former hearing, reported in 205 U. S., 1, crystallize and correctly state the law of this case. The cause of action and the parties are identical, and the question which naturally looms largest at the very threshold of the argument is as to whether the State courts have yielded obedience to the dictates of the mandate of this court.

Therefore, for purposes of convenient reference, and particularly with the view of benefiting by the perspicuous statement of facts and argument contained therein, we venture to here reproduce said opinion in its entirety, to wit:

Mr. Justice HOLMES delivered the opinion of the court:

This is an action for the death of the plaintiff's intestate, Adam M. Schlemmer,

while trying to couple a shovel-car to a caboose. A nonsuit was directed at the trial and the direction was sustained by the Supreme Court of the State. The shovel-car was part of a train on its way through Pennsylvania from a point in New York, and was not equipped with an automatic coupler in accordance with the act of March 2, 1893, c. 196, §2; 27 Stat., 531. Instead of such a coupler it had an iron drawbar fastened underneath the car by a pin and projecting about a foot beyond the car. This drawbar weighed about eighty pounds and its free end played up and down. On this end was an eye, and the coupling had to be done by lifting the free end, possibly a foot, so that it should enter a slot in an automatic coupler on the caboose and allow a pin to drop through the eye. Owing to the absence of buffers on the shovel-car and to its being so high that it would pass over those on the caboose, the car and caboose would crush any one between them if they came together and the coupling failed to be made. Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose. To do so he had to get between the cars, keeping below the level of the bottom of the shovel-car. It was dusk, and in endeavoring to obey the order and to guide the drawbar he rose a very little too high, and, as he failed to hit the slot, the top of his head was crushed.

The plaintiff in her declaration alleged that the defendant was transporting the shovel-car from State to State, and that the coupler was not such as was required by existing laws. At the trial special attention was called to the United States statute as

part of the plaintiff's case. The court having directed a nonsuit with leave to the plaintiff to move to take it off, a motion was made on the ground, among others, "that under the United States statute, specially pleaded in this case, the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler." The question thus raised was dealt with by the court in overruling the motion. Exceptions were allowed and an appeal taken. Among the errors assigned was one "in holding that the shovel-car was not a car used in interstate commerce or any other kind of traffic," the words of the court below. The Supreme Court affirmed the judgment in words that we shall quote. We are of opinion that the plaintiff's rights were saved and that we have jurisdiction of the case, subject to certain matters that we shall discuss.

On the merits there are two lesser questions to be disposed of before we come to the main one. A doubt is suggested whether the shovel-car was in course of transportation between points in different States, and also an argument is made that it was not a car within the contemplation of §2. On the former matter there seems to have been no dispute below. The trial court states the fact as shown by the evidence, and testimony that the car was coming from Limestone, New York, is set forth, which, although based on the report of others, was evidence, at least unless objected to as hearsay. *Damon vs. Carrol*, 163 Massachusetts, 404, 408, 409. It was the testimony of the defendant's special agent employed to investigate the matter.

The latter question is pretty nearly answered by *Johnson vs. Southern Pacific Co.*, 196 U. S., 1, 16. As there observed: "Tested by context, subject-matter, and object, 'any car' meant all kinds of cars running on the rails, including locomotives." "The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars." These considerations apply to shovel-cars as well as to locomotives, and show that the words "used in moving interstate traffic" should not be taken in a narrow sense. The later act of March 2, 1903, c. 976; 37 Stat., 943, enacting that the provision shall be held to apply to all cars and similar vehicles, may be used as an argument on either side, but in our opinion indicates the intent of the original act. 196 U. S., 21. There was an error on this point in the decision below.

A faint suggestion was made that the proviso in §6 of the act, that nothing in it shall apply to trains composed of four-wheel cars, was not negatived by the plaintiff. The fair inference from the evidence is that this was an unusually large car of the ordinary pattern. But, further, if the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. The word "provided" is used in our legislation for many other purposes beside that of expressing a condition. The only condition expressed by this clause is that four-wheeled cars shall be excepted from the requirements of the act. In substance it merely creates an exception, which has been said to be the general purpose of such clauses. *Interstate Commerce Commission*

vs. Baird, 194 U. S., 25, 36, 37. "The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it," etc. *Ryan vs. Carter*, 93 U. S., 78, 83; *United States vs. Dixon*, 15 Peters, 141, 165. The rule applied to construction is applied equally to the burden of proof in a case like this. *United States vs. Cook*, 17 Wall., 168; *Commonwealth vs. Hart*, 11 Cush., 130, 134.

We come now to the main question. The opinion of the Supreme Court was as follows: "Whether the act of Congress * * * has any applicability at all in actions for negligence in the courts of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject." It is said that the existence of contributory negligence is not a Federal question, and that as the decision went off on that ground there is nothing open to revision here.

We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a State court, it must appear affirmatively that the State court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. *Bachtel vs. Wilson*, January 7, 1907, 204 U. S., 36. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this court will take jurisdiction, although the opinion below says noth-

ing about it. *Kaukauna Water Power Co. vs. Green Bay & Missi. Canal Co.*, 142 U. S., 254. And if it is evident that ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & Indianapolis Railroad Co. vs. Indiana*, 194 U. S., 579. The application of this rather vague principle will appear as we proceed.

It is enacted by §8 of the act that any employee injured by any car in use contrary to the provisions of the act, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase "assumption of risk" was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow-servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of *Farwell vs. Boston & Worcester R. R. Co.*, 4 Met., 49, 57, 58. But, at the present time, the notion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and vol-

untarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like §8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.

Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *Choctaw, Oklahoma & Gulf R. R. Co. vs. McDade*, 191 U. S., 64, 68. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the ser-

vant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as controvertible terms. *Patterson vs. Pittsburg & Connellsville R. R. Co.*, 76 Pa. St., 389. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound.

To recur for a moment to the facts, the only ground, if any, on which Schlemmer could be charged with negligence is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel-car as he did, and his orders contemplated that he should do so. But the opinion of the trial judge, to which, as has been seen, the Supreme Court refers, did not put the decision on the fact of warning alone. On the contrary, it began with a statement that an employee takes the risk even of unusual dangers if he has notice of them and voluntarily exposes himself to them. Then it went on to say that the deceased attempted to make the coupling with the full knowledge of the danger, and to imply that the defendant was

guilty of no negligence in using the arrangement which it used. It then decided in terms that the shovel-car was not a car within the meaning of §2. Only after these preliminaries did it say that, were the law otherwise, the deceased was guilty of contributory negligence; leaving it somewhat uncertain what the negligence was.

It seems to us not extravagant to say that the final ruling was so implicated with the earlier errors that on that ground alone the judgment should not be allowed to stand. We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to

some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed.

Judgment reversed.

With this opinion of the Court there was also filed a dissenting opinion in which a strong minority concurred. As possibly helpful, though not necessarily enlightening, we will endeavor to bring the points and the lines of reasoning upon which the two opinions proceeded and turned into such juxtaposition that the points of agreement may be made plainly to appear, and the points of difference may be reduced to their ultimate, and it is believed in view of the present record, to their practically negligible proportions.

Careful study of the two opinions makes it clear that there was no real difference of appreciation between the Court and its minority members, concerning the facts and circumstances surrounding and inducing the occurrence which resulted in Schlemmer's death.

The facts disclosed at the first trial persist in the record now before the Court. The testimony latterly adduced on behalf of plaintiff differs but little, if at all, from that adduced at the former trial,

except in the single particular of establishing affirmatively and beyond question that the defendant railroad company was an interstate carrier by railroad (R. 52, 80) and that the shovel-car was being moved on its own wheels and as a part of a train of cars drawn by a locomotive over the rails of defendant and its connections, from Limestone, in the State of New York, to Glenshaw, in the State of Pennsylvania (R. 118), while the present testimony on behalf of defendant introduced but a single new element, viz., the possibility and probable advantage from the standpoint of safety to the operator of endeavoring to make the desired coupling between the shovel-car and the caboose by pushing the latter toward the former by hand (although this was not attempted at any time), rather than by pushing the former and the train to which it was attached toward the latter by steam power, as was being done when the accident occurred. This new point will be referred to further in an appropriate place hereafter.

Both of the opinions under consideration agree in the conclusion that the shovel-car was a component element of a railroad train being moved by an interstate carrier in interstate commerce, and that it was not equipped with an "automatic" or "safety" coupler as required by the Federal Safety Appliance Law (Act of March 2, 1893, ch. 196, §2; 27 Stats. L. 531).

The opinion of the Court declares the shovel-car to be a "car" within the contemplation of the above

law and the minority opinion expresses no dissent from that view, but on the contrary appears to assume it without question. Both agree that the shovel-car, for a coupler, was equipped with an iron bar several feet in length, weighing between 75 and 80 pounds, fastened by one end at a point underneath the body of the shovel-car back from the front edge of the car body and which, when elevated into a horizontal position, projected several inches, possibly a foot, beyond the same; that its free end was pierced with a hole or eye; that the proposed coupling had to be made by lifting the free end of the bar so that it could be guided or directed into a slot in the coupler attached to the caboose, and then permitting a pin already set in the latter to drop through the eye. There appears to have been no difference, nor indeed room for any, concerning the fact that the accident occurred in the dusk of an August evening, at nearly nine o'clock, and that the men were working with lanterns lighted.

Both opinions concur in finding that the State courts respectively justified or affirmed the propriety of the compulsory nonsuit ordered by the trial court on the ground of deceased's contributory negligence—assumed in the opinion of the Court as matter of law, and in the opinion of the minority as matter of fact—from the circumstance that the deceased, while beneath the end of the shovel-car in a crouching or squatting position and while endeavoring to raise and direct the free end of the

heavy coupler bar into the small slot of the coupler of the caboose, missed his aim, and failing to make the coupling slightly raised his head, though warned to keep it down, and, by reason of the difference in platform levels of the shovel-car and caboose, which permitted the one to pass over the other, the top of his head was caught between the cars and so crushed that death ensued.

Interwoven, however, into the very web of the agreement between the two opinions upon these points, and somewhat obscured by the very existence of such agreement itself, lie the threads of real difference between the two, for while both agree that there was some ground for contending that Schlemmer's action in raising his head while in such a dangerous position, when warned not to do so, might constitute such contributory negligence on his part as to bar plaintiff's right of recovery, the opinion of the Court declares that the circumstances surrounding the occurrence were not such as to justify the compulsory nonsuit as matter of law, while the minority opinion expressly declares that "in the present case" the negligence of the deceased in raising his head was "solely a question of fact," which having been found against him by the State courts could not be reviewed on error here.

But in opposition to the conclusion of the minority opinion on this point we venture to suggest that the finding by the State courts of contributory negligence on the part of the deceased, as presented by

the record, was in no sense a finding "solely" of matter of fact. The case in the State court was tried to a jury. The trial judge or court had no power or authority to find facts as such. If satisfied that the evidence was all one way or that all reasonable men must or would draw the same conclusion therefrom, that court was authorized at most to declare the existence of negligence or contributory negligence as matter of law or of mixed fact and law, and with deference to the learned Justices who concurred in the minority opinion, it is respectfully submitted that that is precisely what the State trial court did. Having no authority or power to find facts as facts it did not purport to do so. It found and held as matter of law, that the defendant railroad company was not chargeable with negligence, although it was transporting in interstate commerce a car not equipped as required by the Federal Safety Appliance Law, because forsooth in the opinion of the trial court the shovel-car was not a "car" used in interstate commerce within the contemplation of that Act, (R. 13) and at the same time it declared that in whatever view it could take of the case, it was "led to the *legal conclusion* that decedent was guilty of negligence that contributed to his death," and the "plaintiff therefore could not recover." (R., 14.)

If, then, the finding on the part of the State courts of the existence of contributory negligence on the part of deceased was, as the trial court declared it to be, one of law, *i. e.*, a "*legal conclu-*

sion," it follows, and necessarily so, that the case of *Chrisman v. Miller*, 197 U. S., 313, 319, and the cases therein cited, which reiterated the perfectly well understood and appreciated principle that this Court, in cases coming before it from State courts, will not review *matters of fact*, but will accept the conclusions of the State tribunals thereabout as final, had no precise applicability to the case then before this court and could not really support the weight of the suggestion that this Court was without jurisdiction to entertain the writ of error or revise the judgment complained of.

In the absence of the Federal Safety Appliance Law and particularly of the provisions of Section 8 thereof, which relieved the servant of assumption of risk, it might be conceded that in like cases coming to this Court from State courts the question as to the existence of either negligence or contributory negligence whether considered as matter of law or of fact would present nothing of Federal cognizance for review, and if the case below went off on such ground alone, there would be nothing open for revision here.

But, considered in the light of Section 8 of that law, and of the quotations made in the opinion from *Patterson v. Pittsburg etc. Co.*, 76 Pa. St. 389, *i. e.*,

"Where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable

that it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident." (205 U. S., 19.)

and from *Narramore v. Cleveland, etc. Ry. Co.*, 37 C. C. A. 499, 505, *i. e.*,

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men, who must earn a living, are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence and cannot recover, because he and not the master causes the injury, or because they jointly cause it."

was it so plain from the record that the difference, under the circumstances of the case, between "assumption of risk" and "contributory negligence" was so clear as to enable the trial court to deduce and declare as matter of law that Schlemmer, who was not shown to have been possessed of any purpose or even disposition to commit suicide, was so lacking in the exercise of that de-

gree of care and caution which the ordinarily prudent man would have been expected to have exercised under like circumstances as to render his conduct obnoxious to the rule of contributory negligence and to put him beyond the pale of the protection which the Federal statute evidently attempted to extend to persons performing substantially similar services under circumstances and conditions of equal, if not entirely similar, danger.

In such aspect of the matter it would seem to be unnecessary, contrary to the suggestion of the minority of opinion, for this Court, in order to maintain its jurisdiction of the cause, to ascertain that there was no proof of contributory negligence on the part of deceased, nor indeed was it necessary for it to consider "whether there was sufficient evidence of contributory negligence" to justify the action of the trial court in granting a compulsory nonsuit. On the contrary, it is submitted that it was only necessary to ascertain from the record that there was some evidence which would have justified the submission of that question to a jury, and in such event the failure so to submit constituted, as the majority opinion found it did, error in matter of law which justified a reversal and necessitated a retrial.

It may well be that if an iron is dangerously hot and one knowing it to be so is warned not to touch it but nevertheless does so without any necessity for his doing so being shown, and is burned

thereby, that it would be trifling to say that there was no evidence of negligence on his part contributing to his injury, but it by no means follows that if an iron be dangerously hot, but nevertheless there does exist necessity for its removal, and one whose duty it is to remove it, though knowing it to be hot, is ordered to remove it by his superior, who at the same time warns him not to get burned while so doing, and in performing his duty under such orders the servant does in fact get burned,—it by no means follows, we venture to submit, that the servant was so clearly guilty of negligence contributing to his injury that all right of recovery by him or on his behalf should be denied as matter of law. Such, we venture to think, is neither the law of the Federal Courts nor of the courts of Pennsylvania, even in the absence of an all-pervading statute, such as existed here, which expressly relieved the servant of ill consequences which might be expected to flow from his attempt to perform his duty in or under even obviously dangerous circumstances. The master ordered the performance, and the statute declared that the master and not the servant should bear the burden and the risk attending such performance.

The fact, adverted to by the minority, that immediately after the fatal injury to Schlemmer, the coupling attempted to be made but failed in by him, “was made by another brakeman (the conductor) without difficulty” under substantially similar circumstances, would seem not to demon-

strate that Schlemmer was necessarily guilty of negligence, or that he did not use care according to the circumstance, but rather that he was justified in undertaking the performance of the duty which his superior officer, the conductor, by express orders imposed upon him, and that the conductor was either more expert or stronger or more steady of hand or more keen of eye than the deceased, or that he had profited by the ghastly experience which the latter's failure afforded.

Both the opinion of the Court and of the minority agree in the proposition, as stated in the latter, that "the rule is well settled that * * * in cases of this nature, a violation of the statutory obligation of the employer, (*i. e.*, not to use in interstate commerce cars not equipped with automatic couplers, coupling by impact, etc.) is negligence *per se*, and actionable if injuries are sustained in consequence thereof." In view of this the negligence of the defendant was fully established. That such negligence continued to the moment of the injury to Schlemmer and thereafter cannot be doubted.

Apart from the case of *Patterson v. Pittsburg & Connellsville R. R. Co.*, 76 Penn. St. 389, cited in both of the opinions under consideration, it has been thoroughly established by numerous cases readily identified in the reports of the Pennsylvania courts, as the law of that State, that although the evidence in any case may tend to show contributory negligence, yet unless it is conclusive,

a question of fact is presented which necessitates the consideration of a jury (*Bitting v. Maxatawny Township*, 180 Penna. St. 357); and where the measure of duty is ordinary or reasonable care, or when the degree of care varies according to the circumstances, the question of negligence or not is always for the jury (*Gates v. Penna. R. R.*, 154 Penn. St. 566); and although the facts from which the deduction of contributory negligence may be drawn are not in dispute, yet if fair-minded men might draw different deductions from them as to whether they in truth demonstrate negligence on the part of the person injured, then the question must be submitted to the verdict of the jury. (*O'Malley v. Scranton Traction Co.*, 191 Penn. St., 410; *Otterbach v. Phila.*, 161 Penna. St. 111.)

So stated and so established, the law of Pennsylvania does not materially, if at all, differ from the law of the Federal Courts on the same subject.

The Federal Statute relieved Schlemmer from any assumption of the risk of injury attending the performance of his duties under circumstances disclosing a continuing negligence *per se* on the part of his master. The possibility of injury incident to miscalculation of the height or position of the moving cars was inevitably and clearly attached to the risk that he did not assume. To direct the heavy coupler bar into the small slot of the automatic coupler fitted to the caboose compelled either the use of eyesight or a submission to blind chance. If he looked, it was inevitable from his position

under the car that he should raise his head. That he was entitled, even if not compelled, to look cannot be gainsaid. To say, under the circumstances surrounding his endeavor, considering his position under the car, the weight of the bar and the gathering darkness, that, as the event proved he raised his head an inch higher than safety would permit, that affords conclusive proof that he failed to exercise that degree of care for his safety that an ordinarily reasonable and prudent man would or should have exercised in such circumstances is to deny the experience of every-day life. Under the established law of Pennsylvania the question was one for the consideration of a jury. To hold the action barred by contributory negligence imputed to Schlemmer as matter of law, although it was difficult to determine from the whole record where the risk from which the statute protected him had ended and the negligence with which the State courts saddled him had begun, was but to declare that the Congress of the United States was without lawful authority to legislate as it purported to do. That such was the view of the State courts appears from their respective opinions.

To concede any measure of efficiency to the statute with respect to the end towards which it is directed, equally required the view of the State courts to be overturned and the judgment founded thereon to be reversed, for "if the judgment stood the statute would suffer a wound," and outside of the District of Columbia and the Territories would have but little force.

Statement of Case at Bar.

As stated above, the facts shown by the record of the former trial and as found in the opinion of this Court, persist in the present record, with but one or possibly two added elements of any substantial import. In view of this we do not deem it necessary to occupy space and time with the restatement of the general facts in detail. They may be deemed to have been sufficiently stated by the learned trial judge, President Judge Read, in his charge to the jury as follows, (p. 153:)

"Gentlemen of the jury: The deceased, Adam Schlemmer, was an employé of the defendant company. It appears that he was killed August 5, 1900, in the course of his employment, while attempting to couple a steam shovel, attached to the rear end of a train of cars, to a caboose standing on the track. This shovel was not the property of the defendant, but was being transported by it for T. F. Ryan, a contractor, from Limestone in the State of New York, to Glenshaw, in the State of Pennsylvania. It was on trucks, and was being transported as cars are usually hauled. It had certain false work about it that made the end project beyond the draw-head of the car and also made it higher than the ordinary car. This shovel car had no *dead-heads* or bumpers on it, and according to the testimony they would not have been of any use in preventing the accident in this case if the car had been so equipped, inasmuch as the false work extending over the rear end of the car would

have rendered bumpers or dead-woods useless in preventing this car from coming in immediate contact with the caboose with which the deceased was attempting to couple it. It was equipped with what is called a draw-bar coupler. The draw-head of the coupler was attached underneath the bottom of the car, extending back two or three feet; and in this draw-head was fastened the draw-bar, which was about three feet long, and hung down at an angle, the free end having a hole or eye in it. This draw-bar weighed from seventy-five to eighty pounds, and when raised level with the bottom of the car extended four or five inches beyond the false work mentioned. The caboose was equipped with an automatic coupler. Like the shovel car, it did not have bumpers or dead-heads, and it was not usual to have the same on a caboose (p. 153). It had a rear platform with splash-boards over the wheels. The false work of the shovel car was so much higher than the caboose that in coming together the rear end of the shovel car would pass over the top of the automatic coupler on the caboose, and strike against the splash-boards on the caboose.

"In making the coupling between these two cars it was necessary to get down under the shovel car between the rails and take hold of the draw-bar on that car and raise it five or six inches to about level with the head, and guide it into the slot of the automatic coupler on the caboose. It was in performing this act, or attempting to perform it, that the deceased met with the injury which caused his death." * * *

"It is admitted that the deceased was an

experienced brakeman; that he had been engaged in railroading for fifteen or sixteen years prior to the accident. And the defendant alleges that the draw-bar coupler was well known to railroad men; that its construction was so simple and the method of operating it so plain and easily understood that no instruction as to how to operate it was necessary. The testimony both on the part of the plaintiff and the defendant seems to support this allegation of the defendant. But in this particular instance the plaintiff contends that the coupling of these two cars was rendered unusually dangerous by reason of the fact that the end of the shovel car was higher than the caboose and would pass over the top of the automatic coupler on the caboose, and, being without bumpers or *dead-heads*, would come in immediate contact with it on failure to make the coupling. It is therefore contended that the deceased should have been instructed as to this condition and operation of the two cars, and that a failure to do so was negligence on the part of the defendant. This contention is based on the allegation that the defendant had no knowledge of the fact that the end of the shovel car would pass over the top of the automatic coupler on the caboose and that no time or opportunity was afforded him to acquaint himself with this fact" (p. 154).

On the former trial there was some suggestion to the effect that deceased might have avoided the dangers incident to the making of this coupling by using a "stick" which the rules of the company required to be used when making link-and-pin

couplings. There is no longer room for any such suggestion (R., 54).

On the first trial the defendant company called no witnesses and adduced no testimony in its own behalf. Neilson, the conductor having charge of the train crew to which Schlemmer belonged, and Coates, the conductor of the yard or shifting crew to which Schlemmer did not belong, were called and testified at the instance of the plaintiff. On the second trial Messrs. Neilson and Coates, with one John F. Casey, who was the engineer on the shovel-car, in the employ of the Contractor Ryan, were called by the defendant and testified in its behalf.

Neilson, who was the conductor in charge of the train crew of which Schlemmer was a member, and of the coupling operation in which Schlemmer was engaged when he met with the injury that caused his death, testified that the locomotive and cars with the shovel-car on the rear end "backed down to within four or five feet of the caboose and stopped;" that Schlemmer was standing by the caboose and said, "I will enter this drawbar; you drop the pin," and witness replied, "No, I will set the pin; it will drop itself." Prior to this witness had said, "Mr. Schlemmer, you be very careful now and keep your head down low so as not to get mashed in between those cars," and he, Schlemmer, said "he would." Then Schlemmer "got in between the cars— * * * got down underneath—and took hold of the drawbar to enter it

into the automatic coupler." Witness stepped back where he could see the rest of the men and the engine, and gave a signal to come back very slow, which it did. "While Mr. Schlemmer was raising his drawbar with his hand, he raised his body and permitted the top part of his head to come between this false work of the steam shovel and the end of the caboose, and was crushed" (p. 125).

Witness afterwards coupled the steam shovel to the caboose by using a yard engine to push the caboose close up to the steam shovel and "witness got underneath and made the coupling in the same way that Mr. Schlemmer attempted to couple it" and experienced no trouble in so doing (p. 126).

On cross-examination witness stated that he had told Schlemmer "to keep down" and that he supposed the latter "was trying to keep down," but "at the same time he raised up. If he had kept down it would not have happened." Schlemmer could "have raised up his arm without raising his head," but he had "to watch the hole in the automatic coupler that he was putting the drawbar in." He would naturally "hold his head up to a certain extent" in order to see the hole in the automatic coupling, but it was not necessary "to hold it up high enough to get it crushed" (p. 128); "his (Schlemmer's) head was crushed before the bar ever touched the drawhead, on account of him raising his body in raising this bar" (p. 129). When witness (Neilson) made the coupling the "caboose was shoved up by a yard engine;" it was not

“pushed up by hand;” “the engine just shoved the caboose against the 17 cars instead of shoving the train against the caboose;” “this was not the usual way, for we were not in the habit of carrying a caboose behind the train for that purpose” (p. 130). Schlemmer “was told to keep down, that was enough to let him know that it was dangerous;” he did keep down “to a certain extent, but not low enough to keep from getting caught.” Schlemmer had his back to the steam shovel and was facing the caboose (131); he had to raise the drawbar “just about level with his head—in order to make this coupling;” when raising it his body “would be down beneath the bar,” “between the rails” and he could not have made it (the coupling) in any other way; he was “stooping down” and “his hips, and knees and ankles—all three—were bent;” he was crouched low down under the shovel car and “he had to watch that hole while he was putting in the drawbar” (132); “it was not necessary for men as a general rule to get in between the tracks,” but this was a “more or less” dangerous coupling, “in one sense of the word it was difficult, and in another it was not, it was very simple” (134); Schlemmer’s head had “been crushed before that end of the drawbar touched the automatic coupler;” witness had no reason “to believe that he (Schlemmer) intentionally raised his head up,” on the contrary, “would say it was unintentional on his part” (135).

Coates, a yard conductor in charge of the shifting crew, testified that Schlemmer "had no right to take any instructions from him whatever, although a railroad man would caution another in a case of that kind, you know" (140); that just before the cars got together he (Coates) walked up to the caboose and suggested to Schlemmer that "they had better shove that caboose on by hand." Schlemmer replied "Never mind. I will make this coupling." As the cars got closer together witness saw Schlemmer "was too high;" he had "got down in the first place; and he got down again. But in raising the link he raised his head." Witness called to Schlemmer twice "to get down." The second time "not more than a second, probably, (or) a couple of seconds" before Schlemmer was injured.

On cross-examination witness admitted that although he had testified before the coroner's inquest and at the first trial of this case, he had not told anything about having suggested to Schlemmer that he had "better shove the caboose up by hand" because he did not know that he "was asked that" (138). When Schlemmer made this coupling he was on the ground stooping down between the rails *as was necessary* and he "*could not have made this draw-bar coupling there that evening any other way;*" his ankles, knees and hips were all bent up together; in one way it was a dangerous coupling to make and it is very likely "that he just miscalculated that thing one inch" (141). Though claiming to have suggested the moving of the caboose to

the shovel-car by hand for the purpose of the coupling, witness further testified that after the injury to Schlemmer had occurred "they pushed the caboose up with the yard engine I (he) had charge of" (142).

James Casey, the engineer of the steam shovel, testified that as he saw the train backing up, Schlemmer, who had been cleaning lamps in the caboose, got out on the front end of it, when witness remarked "we had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." To which Schlemmer responded "Oh, hell; back up." "And then the conductor came and inserted the pin slantwise, and stepped back and gave the signal to back up slowly" (144). After Schlemmer was hurt the conductor (Neilson) "got down under the shovel and the yard engine pushed the caboose up, and he coupled it" without "any trouble" (p. 145).

On part of the plaintiff it was testified that to make this coupling "a man would have to get in between the rails to raise that (the coupler bar) up. His arm would not be long enough" (p. 41). It would not have been "customary to have shoved the caboose to the train by hand (pp. 57, 81); a man could be caught one way as well as the other" (p. 58); to make this coupling "*it was necessary*" for Schlemmer to go between the rails and raise the draw bar up with the hand as the car came back (p. 89).

In this state of the evidence the trial court, in submitting the case to the jury, charged it, among other matters and considerations not necessary to be reviewed here, as follows:

..* * * There is a wide distinction between assumption of risk and contributory negligence as pointed out in the decisions of our courts of last resort. The defense of assumption of risk is not permitted the defendant in this case, for the reason already stated. (Reference being to act of March 2, 1893, safety appliance law.) But the defense of contributory negligence has been left untouched by the Federal statute, and the defendant therefore may still avail itself of this defense.

“If you are satisfied from the evidence that the deceased was killed in the line of his employment while acting as an ordinarily careful and prudent man would act in the same circumstances and under the same conditions, then you would be warranted in finding that his injury and death were properly chargeable to the risk of his employment, and inasmuch as the defendant is not in a position to assert this defense the plaintiff would be entitled to recover. The allegation of the defendant, however, is that the deceased acted recklessly and unnecessarily exposed himself to the injury which caused his death; and it further contends that the testimony on this point is substantially undisputed. * * *

“The plaintiff, however, contends and has offered testimony to show that this was a heavy draw-bar and that the deceased in his cramped position under the car was unable

to raise and guide it into the slot in the automatic coupler on the caboose without necessarily raising his body and head more or less; and therefore it is contended that he cannot be held guilty of negligence because of a slight miscalculation in the distance which he raised his head above the danger line. * * * Mr. Neilson (p. 156), conductor on this train, expressly states in his testimony that he told the deceased to be very careful not to raise his head or to get it between the ends of the cars or he would get smashed; and that the deceased promised him he would be careful not to do this. This witness further testified that it was not necessary for the deceased to raise his head above the bottom of the shovel-car in making the coupling; that he was warned to keep his head under the false work of the shovel-car and that is where he should have kept it in making the coupling, and if he had done so he would not and could not have been injured. The testimony of all the witnesses is substantially to the effect that if the deceased had kept his head under the false work of the shovel-car he could not have been injured.

“Now, gentlemen, it seems to me that the evidence tends very strongly to the conclusion that the deceased unnecessarily and recklessly exposed himself to a danger which was not necessarily incident to his employment, a danger that was obvious and against which he was warned at the time, and by reason thereof was injured. And if you are so satisfied, then your verdict should be for the defendant on the ground of the contributory negligence of the deceased.

* * * The testimony of the witnesses—or those who saw just how the accident occurred—is that it was the result of his unnecessarily and recklessly exposing his person to a known danger, which he could have and would have avoided had he exercised ordinary care and prudence in the performance of the act required of him, or if he had observed the warnings and instructions given him. And if this is so, he was guilty of negligence, contributing to his injury, and verdict should be for the defendant.

“If the testimony impresses you as it does the court, and you are satisfied that the deceased was guilty of negligence contributing to his injury, then it will be unnecessary for you to consider the question of damages, because in that event your verdict will be for the defendant (p. 157). * * *

* * * * *

“Sixth. Even if Schlemmer slightly miscalculated the height of the car behind him while his duty required him in his crouching position to direct the heavy draw-bar moving above him into the small slot in the automatic coupler on the caboose in front, in the dusk of the evening, such miscalculation under such circumstances was a risk which, under the act of Congress of March 2, 1893, chapter 196, Schlemmer did not assume.

“If satisfied from the evidence that it was necessary for the deceased to get between the ends of the cars in making the coupling and that his injury was the result of slightly miscalculating the height of the car behind him, such miscalculation would

be a risk which under the act of Congress the deceased cannot be held to have assumed. But if it was not necessary for him to get in between the ends of the cars to make the coupling and he was warned not to do so and promised to heed the warning, but in disregard of the warning and his promise and without any necessity therefor did put his head between the cars and have it crushed, it would be such negligence on his part as would defeat this action (p. 159).

* * * * *

“Eleventh. If Schlemmer exercised the degree of care and caution incumbent upon a man of ordinary prudence in the same calling under the circumstances in which he was placed, he would not be guilty of contributory negligence that would defeat the plaintiff’s right of recovery. * * *

“Now, gentlemen, the question of first importance for you to determine, as I view this case, is whether the deceased acted the part of an ordinarily careful and cautious man in attempting to couple these two cars together, or whether he went about that work in a careless and negligent manner (p. 160).

“The making of a coupling of this kind was not an everyday occurrence. This was an extraordinary occasion, the transporting by the defendant of a shovel-car as it came to them from the owner of the same. Therefore the deceased was left largely to his own selection of the manner of making it. As already stated, he was familiar with the duties of a brakeman and the coupling of cars, and it was his duty to make this particular coupling in the safest way suggested

to him; and if he rejected that way of doing it and selected one of his own, manifestly dangerous and difficult, when a much safer one was equally manifest, and he was thereby injured, the defendant is not responsible, and your verdict should be in its favor.

“Or if he was warned of the danger and told to keep down under the bottom of the shovel-car, that if he got between the ends of the cars he would be crushed; and he could have safely made the coupling by keeping down under the shovel-car and not getting between the ends of the cars and without any necessity therefor did put his head between the ends of the cars, and it was thereby crushed, his negligence in this particular would bar any right of action against the defendant company, and your verdict should be in its favor” (p. 161).

It probably would be difficult for any one to contend seriously that this charge was unduly favorable to the plaintiff, or that any circumstance or suggestion that might reasonably have made for the benefit or advantage of the defendant failed of mention or was left to the imagination of the jury. Despite the distinctly adverse character of the charge, the jury returned its “*verdict*” in the sum of \$10,000 in favor of plaintiff, thereby determining as matter of fact that “the deceased acted the part of an ordinarily careful and cautious man in attempting to couple these cars together” and that he had not gone “about that work in a careless and negligent manner” (p. 160).

The Judgment Non Obstante Veredicto.

On the motion for judgment *non obstante*, the learned trial judge declared that the "deceased, in the face of repeated warnings to keep down, and to be careful not to get caught between the ends of the cars, took a position which it was not necessary for him to take and which exposed him to the very danger against which he was warned." * * * "In this he was guilty of negligence contributing to his injury, which, under the settled law of this State, bars a recovery for damages on account of such injury" (p. 33).

But there was direct and positive evidence before him tending to prove that the position which Schlemmer had taken was "necessary" to be taken by him in order to perform the duty which, under the immediate direction and eye of his immediate superior, Neilson, the train conductor, he was endeavoring presumptively to the best of his ability to perform. It would be idle to say that Schlemmer was not working under the orders of his superior. The fact that Neilson himself testifies to the conversation about setting the pin, and his instructions to "keep down" demonstrates the contrary, and the fact that even after his subordinate had lost his life in the endeavor, Neilson himself assumed the same position between the rails beneath the shovel-car and made the coupling in the manner in which Schlemmer had attempted to

make it, is proof positive that Neilson deemed it proper if not absolutely necessary for Schlemmer to have attempted the coupling in the way that he did attempt it. Schlemmer's injury plainly indicated the desirability of shoving the caboose to the train, rather than the train to the caboose, but before the accident, Neilson, who was responsible for the movement, did not suggest the advantage of such course to Schlemmer, and neither Coates nor Casey seem to have thought it worth while to mention to Neilson, the "man in charge," either their fears or the supposed advantage of "shoving" the caboose up by hand. If either one suggested the hand movement to Neilson, even after the accident to Schlemmer, he apparently rejected it, for although Coates testifies that the necessary men for the purpose were at hand, nevertheless "they pushed the caboose up with the yard engine I (Coates) had charge of" (p. 142).

It will be recalled that on the first trial Casey was not called to give testimony, and Coates made no reference to the fact, if it was a fact, that he had suggested to Schlemmer that the caboose should be moved toward the shovel-car by hand.

After what had occurred to Schlemmer, the desirability of moving the lighter caboose to the heavier and more unmanageable train, rather than to reverse the movement, was doubtless apparent to the most fat-witted spectator—but even so, both Neilson and Coates seemed still to have confined

their practice to the use of steam power, and this in preference to hand.

The credibility of the witnesses, both Coates and Casey, as well as of all of the others under the laws of Pennsylvania, was for the determination of the jury, and the fact, which was made plainly to appear, that neither at the coroner's inquest nor in the course of his testimony on the first trial had Coates thought it worth while to mention his alleged conversation with Schlemmer, although he claims to have disclosed the fact of its occurrence to one of the counsel for defendant, and that Casey had not been called at all until the retrial to testify to the dead man's alleged contemptuous rejection of his well-meant suggestion—he had no authority to give him any direction—may well have been considered by the jury as circumstances rendering the testimony given by both of them of little weight. It is to be borne in mind that the only mouth that could have contradicted either of them had been closed and sealed by death.

In view of the actual occurrences disclosed by the entire evidence, and particularly in view of the circumstance that even after Schlemmer had been fatally injured, Neilson, in making the coupling, did not make use of hand power, was it either reasonable or right for the learned trial judge to assume as matter of law that it was Schlemmer's duty to have pursued such course and that his failure so to do fixed "him with such negligence as bars a recovery?" Was it so clear and certain that

Schlemmer had had a choice of ways, and had voluntarily chosen the unsafe as against the safe, that it was competent for the trial court to declare as matters of law that he had voluntarily taken a risk to which his employment had not necessarily exposed him; that the "question of assumption of risk" had been injected into the case "without any evidence to support it;" that the risk of injury which Schlemmer "took" "was not involved in his contract of employment," but was "deliberately created for himself;" and "conceding it was his duty to make this coupling," "he utterly failed" "to exercise ordinary care and prudence in its performance?"

The learned trial judge, weighing the very same evidence which he had previously submitted to the jury, and confirming his declaration that it showed that Schlemmer failed to exercise "care and caution according to the circumstances to avoid injury in making this exceptional coupling," adjudged as matter of law that Schlemmer was therefore "clearly guilty of negligence contributing to his injury," and upon such "testimony" felt himself "constrained to enter judgment on it for the defendant, notwithstanding the verdict rendered in favor of the plaintiff" (pp. 33-35).

Conceding that such conclusion, no matter how erroneous, in the absence of the particular provision of the Federal statute here in question would present no question of Federal cognizance, in the presence of such statute, must not the result be

otherwise? Must it not remain for this Court to determine on final analysis whether the State tribunals, though seemingly adjudging a matter of local concern, may not, unconsciously, no doubt, have failed to observe that in its "broad sense" assumption of risk "obviously shades into negligence as commonly understood," and that the difference between "assumption of risk" and "contributory negligence" "is one of degree rather than of kind;" and also that in the presence of a statute which exonerates a servant from the former, even "if at the same time it leaves the defense of contributory negligence still open to the master," "unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

This Court has already said that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not "assume the risk." Referring to the compulsory non-suit entered for defendant on the former trial, it has also said that even if it had "been put clearly and in terms on Schlemmer's raising his head too high after he had been warned," nevertheless this Court "could not avoid dealing with the case, because it still would be our (its) duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name," and it was the conclusion of the Court

“that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute required that the judgment should be reversed.”

With respect to Schlemmer's “minute miscalculation” in raising his head, the case now is no different from what it was before—except perhaps the rendition of judgment *non obstante veredicto* may be slightly more objectionable and slightly more in derogation of the statute than was the former judgment on compulsory non-suit.

The only question open on the testimony would seem to have been and to still be whether under the circumstances disclosed by the record the added defense with respect to a choice of ways had been so supported that the judgment *non obstante veredicto* was not only justified as matter of law, but that in pronouncing it no violence would be or was done to the purposes of the Federal statute or to such rights of the servant as it purported to conserve.

Assignments of Error.

I.

The Supreme Court of Pennsylvania erred in remanding this case to the Court of Common Pleas of Jefferson County with directions to try the case upon the settled principles of the law of the State of Pennsylvania as to contributory negligence as theretofore declared in the decisions of said Supreme Court.

II.

The Supreme Court of Pennsylvania erred in holding that the present case was "a clear case of contributory negligence within the settled law of Pennsylvania," and that the "evidence was indisputable" that the decedent had attempted to make the coupling in a dangerous way when his attention had been called to a safer way, and that he had done so with reckless disregard of his personal safety, though cautioned otherwise.

III.

The Supreme Court of Pennsylvania erred in affirming the judgment *non obstante veredicto* of the Court of Common Pleas of Jefferson County.

Each of the foregoing assignments of error is to be argued and tested in the light of the provisions of the act of the Congress of March 2, 1893, ch. 196 (27 Stats. L., 531).

Jurisdiction.

In view of the prior judgment of this court in this very cause it would seem that the jurisdiction of this court to entertain this writ of error could not seriously be contested.

Schlemmer *vs.* Buffalo, &c., Ry. Co., 205 U. S., 1.

Carter *vs.* Texas, 177 U. S., 442, 447.

Erie Railroad Co. *vs.* Purdy, 185 U. S., 148, 154.

Johnson *vs.* Southern Pac. Co., 196 U. S., 1.

Anderson *vs.* Carkins, 135 U. S., 483.

The plaintiff in error here contends that the Federal right, privilege, or immunity claimed by her, and denied by the decisions of the State courts, is inextricably interwoven with the supposed defense of contributory negligence on the part of the deceased, and that the application of the provisions of the Federal statute invoked by plaintiff to the facts disclosed in evidence was the prime matter for adjudication before the State courts. The proper disposition of the questions so raised would have been decisive of the whole case.

Paraphrasing the language which this honorable court used in the case of Anderson *vs.* Carkins, 135 U. S., 483, it is immaterial that the State courts considered the case to fall within the principles of common or State law untrammelled by statutory enactments. "The grasp of the Federal statute

must first be released. The construction and scope of that are Federal questions in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court."

A case arises under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.

Cohens vs. Virginia, 6 Wheaton, 375.

Also whenever the rights set up by a party may be defeated by one construction or sustained by another.

Osborne vs. Bank of United States, 9 Wheaton, 738.

Starin vs. New York, 115 U. S., 248.

The jurisdiction of this court extends to every right protected by the laws of the United States, irrespective of the source whence such rights may spring.

New Orleans vs. De Armas, 9 Peters, 224.

And the refusal of a State Supreme Court to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives to this court jurisdiction to review its judgment.

Des Moines Nav., &c., Co. vs. Iowa Homestead Co., 123 U. S., 552.

Phoenix Bank vs. Risley, 111 U. S., 125.

While it is conceded that this court cannot enter upon the inquiry as to whether the finding of a jury in a State court is against the evidence,

Missouri, Kansas & Topeka R. R. Co. *vs.*
Haber, 169 U. S., 639,

nevertheless the question as to the sufficiency, competency, or legal effect of the evidence as bearing upon a question of Federal law raised in the course of the trial, may be reviewed by this court as a supreme court of error of a State may review the proceedings of inferior courts of original jurisdiction.

Mackey *vs.* Dillon, 4 Howard, 447.

Dower *vs.* Richards, 151 U. S., 658.

Though it should be conceded that in the absence of any question as to the construction and application of the Federal Safety Appliance Law the defense of contributory negligence gives rise to questions of general law merely, which are finally determinable by the decision of the State court (*Texas, &c., R. R. Co. vs. Johnson*, 151 U. S., 81, 98), still where, as here, contributory negligence as matter of defense is found and declared as matter of law by the State courts, and the plaintiff's right to immunity from the burdens of such defense set up under the provisions of a Federal statute are by such declaration, in effect if not in fact, denied, this court has jurisdiction to consider and determine for itself whether, under the provisions of the Federal statute specifically invoked, the defense of

contributory negligence is available to a defendant who had violated its express prohibitions, and, if so, then whether the evidence upon which such defense rested was of such a character as justified the trial court in disregarding the verdict of the jury and in entering judgment for the defendant *non obstante veredicto*.

The question as to the effect of contributory negligence as a defense in actions for damages arising out of a violation by an interstate carrier of the prohibitions of the Act of March 2, 1893, as amended was first raised in the case of *Johnson vs. Southern Pacific Co.*, *ubi supra*, and was there left open by this court as follows:

“Finally, it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the Circuit Court of Appeals did not consider this question, nor apparently did the circuit court, and we do not feel constrained to inquire whether it could have been open under §8, or, if so, whether it should have been left to the jury under proper instructions.”

If the defense of contributory negligence was open at all, the evidence in the case at bar upon that point was of such character as required at least that it should have been submitted to the jury for its consideration.

A similar reservation was made in the majority opinion on the former hearing of this cause.

ARGUMENT.

That the shovel-car was a "car" within the meaning of the safety appliance law has already been determined in this very cause (205 U. S., 1), and it has likewise been so determined in principle in *Johnson vs. Southern Pac. Co.*, 196 U. S., 1.

What effect the plaintiff's marriage to Craig during the pendency of the suit may have had upon her right as "widow" of Schlemmer to further maintain the action is not open here. The matter was purely of local cognizance, and it was not decided by either of the State tribunals (R., 35, 174).

The learned trial judge, justifying the entry of judgment for the defendant notwithstanding the jury by its verdict had declared that the deceased had exercised that degree of care and caution which an ordinarily careful and cautious man would have exercised in the circumstances, and notwithstanding the risk and danger incident to making the coupling were not so obvious and imminent that an ordinarily careful and prudent man would not have attempted it, expressed the opinion that the testimony forced the conclusion that the deceased as matter of law had been guilty of negligence,

First, in failing to exercise care according to the circumstances;

Second, in not adopting the safe, or at least "safer," way pointed out to him for making the same.

With respect to the first ground, the jury on a charge from the court which as above stated could hardly be classed as favorable to the plaintiff, had unanimously declared to the contrary, and with respect to the second had likewise unanimously indicated at least its "doubt" whether in truth a choice of ways had been opened to the deceased, who was acknowledged to be an experienced and competent brakeman, and who presumptively was possessed of the reasonably human desire to continue in life—however full of hardships and dangers it may be.

The learned trial judge was of opinion that the deceased had taken a position which it was not necessary for him to take and which exposed him to the very danger against which he "had been warned." But there was considerable evidence, and with the exception of the alleged suggestions of Coates and Casey "to move up the caboose by hand," it stood uncontradicted, that with the exception of the unfortunate upward movement of his head at the critical moment, it was necessary, under the circumstances, for Schlemmer and for Neilson also, to do what each had done, the one failing and the other succeeding, in order to accomplish the coupling. But in so doing, said the learned trial judge, the deceased "was guilty of negligence contributing to his injury, which, under

the settled law of this State, bars a recovery for damages."

But this court had already said that whenever a defendant interstate carrier by railroad has been guilty of negligence in failing to comply with section 2 of the Act of March 2, 1893, and contrary to the prohibitions of that section has undertaken to "haul or permit to be hauled or used on its line" a "car" "not equipped with couplers coupling automatically by impact," and the protection of section 8 of said Act had been invoked by or on behalf of the injured employee, "then unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name," viz., contributory negligence, and had also said that,

"If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy draw-bar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. * * * We are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the

statute requires that the judgment should be reversed."

We venture to submit that the judgment against the plaintiff shown by the present record rests upon no better foundation than did the former judgment which the court denounced as above. On the contrary, by reason of the action of the jury it would seem to be even less tenable—for the very fact that the learned trial judge and the twelve men in the box differed with respect to the question as to whether the deceased had used care according to the circumstance, there being some evidence on the subject, demonstrates beyond peradventure that even if the facts testified to were undisputed, nevertheless, the inferences capable of being drawn were not "indisputable, and such that all reasonable men must honestly draw the same conclusion therefrom."

If "assumption of risk" in the broad sense and as extended to dangerous conditions of machinery, premises and the like which the injured party understood and appreciated when he submitted his person to them, "obviously shades into negligence as commonly understood," and if the difference between the two conceptions "is one of degree rather than kind," may it not now be suggested both with reason and force, that in granting judgment to the defendant notwithstanding the verdict of the jury for the plaintiff, that degree of care necessary to preserve decedent's rights from sacrifice was not observed by the learned trial judge but in fact and

contrary to the Federal law, he held decedent bound in the shackles of "assumption of risk" by christening his bonds "contributory negligence."

The law of the courts of Pennsylvania with respect to questions of negligence and contributory negligence does not differ materially from the well-established law of the courts of the United States, for it is the law of both that where in an action to recover damages for injuries the testimony is such as to make the existence of one or the other matter of fact, the case must be submitted to the jury.

It seems to be perfectly well established in the law of Pennsylvania that where the facts are disputed, or if undisputed where there is any reasonable doubt as to the inferences which may be drawn from them, or "when the measure of duty is ordinary and reasonable care and the degree (of care) varies according to the circumstances, the question of negligence cannot in the nature of the case be considered by the court. It must be submitted to the jury, as it is only where the facts and inferences therefrom are undisputed and where the precise measure of the duty is determinate that the question is one for the court."

Esher vs. Mineral Range & Min. Co., 28
Penna. Superior Court, 387.

The question of negligence is one of law for the court only when the facts are such that all responsible minds must draw the same conclusions from them.

In *Mill Creek Township vs. Perry*, 12 *Atlantic Reporter*, 149, a Pennsylvania case, it was said that where there is no rule of law prescribing what a man shall do or refrain from doing in a particular situation, both the theory of the law and the constitutional right to a trial by jury unite in the conclusion that the question "of what is ordinary or reasonable care in a given situation shall be determined by twelve men in the jury box and not by a single legal scholar on the bench."

And again in *Bitting vs. Maxatawny Township*, 180 *Penna. State*, 357, it was said that although the evidence in the case may tend to show contributory negligence unless the tendency be conclusive, there is presented a question of fact for the jury.

And again, the late Chief Justice Sterrett, speaking for the court, declared that,

"Comprehensibly defined negligence is the absence of care according to circumstances and it is always a question for the jury where there is a reasonable doubt either as to the facts, or inferences of fact to be drawn from the testimony. When the measure of duty is ordinary or reasonable care and when the degree of care varies according to the circumstances, the question of negligence is always for the jury."

Gates vs. Penna. R. R. Co., 154 *Penna. St.*, 556.

Although the facts from which the deduction of contributory negligence is or may be drawn are not

in dispute, yet if fair-minded men might draw different deductions therefrom as to whether they show negligence on the part of the person injured, the question is one for the jury.

O'Mally vs. Scranton Traction Co., 191
Penna. St., 410.

“Where the negligence of the defendant has prepared a risk for another and such other in the course of duty submits himself to the risk and is hurt in consequence thereof, the question as to whether the injured man was ‘guilty of contributory negligence’ is always a question of fact for the jury.”

Otterbach vs. Philadelphia, 161
Penna. St., 111.

And when the circumstances under which the parties acted are complicated and the general knowledge and experience of mankind do not at once condemn the conduct as careless, the question is for the jury.

Philadelphia, &c., R. R. Co. vs. Spearen, 47
Penna. St., 300.

Westchester, &c., R. R. Co. vs. McElwee, 67
Penna. St., 311.

In order to justify the withdrawal of the question of negligence from the jury, the facts must not only be undisputed but such that the conclusion to be drawn from them is indisputable and such that all reasonable men must honestly draw

the same conclusion therefrom. If not, then the question must be submitted to the jury.

R. R. Co. vs. Cadow, 120 Penna. St., 559.

Bare vs. Penna. R. R., 135 Penna. St., 95.

Ely vs. Pittsburgh, &c., R. R., 158 Penna. St., 233.

And whether the facts be disputed or undisputed, if impartial fair-minded, reasonable and capable men may honestly draw different conclusions therefrom, the case must be submitted to the jury.

Johnson vs. Bruner, 61 Penna. St., 58.

R. R. Co. vs. Jones, 128 Penna. St., 308.

Fisher vs. R. R. Co., 131 Penna. St., 292.

Smith vs. R. R. Co., 158 Penna. St., 82.

We think the record clearly indicates that the court below erred in holding as matter of law that the deceased was guilty of contributory negligence. The question should have been left where the jury left it, and this Court has held that where there is any room for doubt the evidence must be submitted to the jury. In one of the earliest cases, *Railroad Co. vs. Stout*, 17 Wall., 657, at page 663, Mr. Justice Hunt, in discussing the question as to submission of questions of this kind to the jury, said:

“It is true in many cases that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury. This is true in that class of cases where the existence of such

facts comes in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sen-

sible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, and they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

“In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.”

The defendant was clearly guilty of negligence *per se* in hauling or permitting the shovel-car,—improperly equipped as it was,—to be hauled over its line of road. Conceding *arguendo* that there may have been some evidence of negligence on

Schlemmer's part, it was for the jury and not for the court to say whether the negligence of the defendant or the supposed negligence of deceased was the proximate cause of the injury.

Northern Pac. R. R. *vs.* Everett, 152 U. S., 107.

Inland & S. Coasting Co. *vs.* Tolson, 139 U. S., 551.

In Baltimore & Ohio R. R. Co. *vs.* Baugh, 149 U. S., 368, it was said:

"Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. Today the volume of interstate commerce far exceeds the anticipation of those who framed the Constitution, and the main channels through which the interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce by the Interstate Commerce Act and its amendments (24 Stats., 379, c. 104), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars (Public Acts, 52d Cong., 2d sess., c. 113). The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every State line? If to a train running from Baltimore to Chicago it should, within the limits of the State of Ohio, attach a car for a distance only within

that State, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through car and the company? Whatever may be accomplished by statute—and of that we have now nothing to say—it is obvious that the relations between the company and employee are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law.

In *Grand Trunk Railway Co. vs. Ives*, 144 U. S., 408, the court approved an instruction of the trial court to the effect that, if from the evidence it was found that the train which inflicted the injury was moving at a rate of speed forbidden by the city ordinance, the law authorized the jury to infer negligence on the part of the railroad company as one of the facts established by the proof. The question of contributory negligence on the part of the injured party was likewise held to be a question of fact to be determined by the jury.

It has been held by some State courts, in construing safety-appliance laws, that contributory negligence cannot be pleaded as a bar to recovery by a plaintiff when the proximate cause of plaintiff's injury was the failure of defendant to comply with a statute (*Carterville Coal Co. vs. Abbott*, 181 Ill., 495; *Kansas City, Memphis & Birmingham R. R. vs. Flippo*, 138 Ala., 487).

In the case of *Railroad Co. vs. Holloway*, 191 U. S., 334, it was held that the neglect of the carrier to equip an engine with brakes was *prima facie* evidence of negligence. In that case a horse had gotten upon a trestle, and the failure to have brakes rendered it impossible to stop the locomotive in time to prevent a collision with the horse, by reason of which collision the plaintiff was severely injured, and it was said:

“The purpose of the brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident was, therefore, a proximate cause thereof.”

In the case of *Elmore vs. Seaboard Air Line Ry. Co.*, 41 S. E., 786, Mr. Justice Clark, after citing *Greenlee vs. Ry. Co.*, 122 N. C., 977, and *Troxler vs. R. Co.*, 124 N. C., 191, said:

“This proposition is settled in the cases above cited, to wit, it is the duty of the defendant to use automatic couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is a continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the *causa causans*.”

The same court, in the case of *Fleming vs. Southern Ry. Co.*, 131 N. C., 476, had before it a case brought by a brakeman who had been injured in handling a draw-bar similar to the one in this case, excepting that it was 40 pounds heavier and 2 feet longer. In referring to the failure of the carrier to comply with the law in that case, the court said:

“There can then be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff’s negligence, if there was any, and is the proximate cause of the injury.”

If uniformity in the construction and application of the provisions of the Safety Appliance law is desired or desirable it is evident that this court must declare the rule by which the local tribunals, both Federal and State, must be governed, otherwise confusion must result.

From the mere fact of the occurrence of injury contributory negligence on the part of the injured party is not to be presumed.

In the case at bar, where the defendant was clearly guilty of a continuing negligence, the deceased, a sober, competent and dependable man, while endeavoring to perform the duties of his position, suffered the injuries which caused his death.

In at least one aspect of the evidence the successful performance of the particular duty required of him necessitated his going between and underneath a moving car, assuming a cramped and unnatural position between the rails and while in such dangerous situation, and keeping pace with the moving car, to raise and guide into a narrow slot an awkward and heavy iron bar held at least on a level with his head.

How was he to guide the bar into the opposite slot unless he raised his eyes, and under the circumstances how could he raise his eyes without elevating the crown of his head? In such circumstances the transaction being but the work of a moment, how can he reasonably be charged with having acted with less circumspection than the exigency of the moment required?

Under the generally accepted principles governing the administration of such matters in the courts of Pennsylvania, the question of deceased's negligence ought in all fairness at least to have been left to the judgment of the jury. The refusal of the State court in this instance to conform to such established principles of administration savors of a disposition to evade and render innocuous the provisions of this most beneficent Federal statute.

The question as to whether decedent's injuries had resulted from "contributory negligence" was properly left to the jury by the trial judge in the first instance, and the jury resolved the question

in favor of the decedent and against the defendant. In setting aside the verdict of the jury and awarding judgment for defendant *non obstante veredicto* the trial court disregarded the likeness between "assumption of risk" and "contributory negligence," which this court had defined as a difference of degree rather than of kind, and failed to observe that care with respect to decedent's statutory rights which this court had declared to be so necessary, in such cases. Practically treating "assumption of risk" and "contributory negligence" as convertible terms, both the trial court and the Supreme Court of Pennsylvania have sacrificed "the servant's rights by simply charging him with assumption of risk under another name."

Upon the whole case, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed and the cause remanded to that court with instructions to reverse the judgment of the court of common pleas of Jefferson County, Pennsylvania, and to remand the cause to that court with instructions to enter judgment for plaintiff on the verdict.

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In the Supreme Court of the United States

October Term, 1910.

No. 374.

CATHERINE SCHLEMMER, NOW CATHERINE
CRAIG, PLAINTIFF IN ERROR,

vs.

BUFFALO, ROCHESTER & PITTSBURG RAILWAY
COMPANY.

In Error to the Supreme Court of the State of Pennsylvania.

PAPER BOOK OF DEFENDANT IN ERROR.

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BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

This defendant, is not antagonistic to the safety appliance acts which have been passed by Congress, but is living up to them to the best of its ability. Certainly, the counsel who writes this brief has no quarrel with them, for every one of them passed during his membership of the House has received his support. He believes them highly meritorious, and in harmony with sentiments of humanity and progress in gov-

ernment. The contention on defendant's behalf is that the pending case is not within the terms or intendment of the Act of March 2, 1893, relied upon by plaintiff. That act, so far as it need be considered here, is as follows:

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred.

"And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to his knowledge: PROVIDED, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains." (Amended by Act of April 1, 1896, to read, "PROVIDED, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains, when such cars or locomotives are exclusively used for the transportation of logs.")

"Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing for good cause extend the period within which any common carrier shall comply with the provisions of this act.

"Sec. 8. That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful

use of such locomotive, car, or train had been brought to his knowledge."

Supplement to Rev. Stat., Vol. 2, p. 102; 27 Stat. L. 531.

Section 2, relating to automatic couplers, was not to take effect until January 1, 1898; and section 7 conferred upon the Interstate Commerce Commission power to extend that time. It was extended by the Commission until August 1, 1900 (8 I. C. C., 643-662). Four days later—August 5, 1900—the lamentable death of Adam Schlemmer occurred.

THIS CAUSE HAVING BEEN DECIDED PROPERLY, BY THE PENNSYLVANIA COURTS, UPON THE SINGLE GROUND OF CONTRIBUTORY NEGLIGENCE, NO FEDERAL QUESTION IS PRESENTED.

The defendant, which owns and operates an interstate railroad, was engaged in transporting from Limestone, in the State of New York, to a point in Pennsylvania, an outfit belonging to one Ryan, a contractor. It comprised a lot of small cars, commonly known as dinkey cars, used for carrying dirt, and a steam shovel used for shoveling dirt in excavating for the purposes of railroad or other construction. The little dinkey cars were loaded bodily into, or on to, defendant's own freight cars,—filling 17 of them. The steam shovel, which from its size and nature, could not be thus loaded, was hauled along behind upon its own wheels, as a farmer might hitch a mowing machine behind his wagon and thus take it to another field. This steam shovel was not, and could not be, used for the transportation of freight or passengers, but only for the purpose of shoveling dirt. Both it and the dinkey cars were the subject of transportation, as freight, by defendant. At DuBois, Pa., while trying to effect a coupling between the steam shovel and the caboose, without orders and in violation of instructions, Schlemmer met his death.

This same cause of action was before this court in *Schlemmer vs. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1. Mrs. Schlemmer, now Mrs. Craig, having secured the support of a second husband, still seeks to recover from defendant, damages for loss of the support of the first.

Section 8 of the act of 1893 deprives the common carrier of the defence of "assumption of risk," in the event of an injury to an employee by locomotive, car or train in use contrary to the provisions of the act. In the former case, the trial court and the Supreme Court of Pennsylvania held that the deceased had been guilty of such contributory negligence as to deprive the plaintiff of the right to recover. This court—Mr. Justice Brewer, Mr. Justice Peckham, Mr. Justice McKenna and Mr. Justice Day, dissenting—reversed the judgment. Mr. Justice Holmes, delivering the majority opinion, after some discussion of assumption of risk and contributory negligence, said—

"When a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as controvertible terms. *Patterson vs. Pittsburg & Connellsville R. R. Co.*, 76 Pa. St. 389. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound."

The Patterson case was decided thirty-seven years ago; but a consideration of what the court actually did decide in that case, and of its decisions in other cases, will show clearly that it does not now, and never has, considered assumption of risk and contributory negligence as convertible terms; and an examination of this record will show that they certainly have not been so considered in the case now pending.

In the Patterson case the defendant railroad company had in use a switch of improper and dangerous construction, of which its officers had been duly notified but without taking any steps to repair the defects. Because of such defects the plaintiff was injured.

Having referred to plaintiff's offer to prove these facts, the court said (p. 392):

"The defendants' counsel object to this offer: 1st. 'Because the injuries complained of were received by the plaintiff while employed as conductor on defendants' road, and were incident to his employment as such.'

"2nd. 'That the plaintiff, being fully aware of the condition of the switch, voluntarily continued to expose himself to the threatening danger, and was thereby guilty of such contributory negligence as will disable him from recovery.' The court sustained the objections and overruled the offer.

"We hold this action of the court to be erroneous. It is true the master is not responsible for accidents, occurring to his servant, from the ordinary risks and dangers which are incident to the business in which he is engaged; for in such case, the contract is presumed to be made with reference to such risks. But, on the other hand, where the master voluntarily subjects his servant to dangers, such as, in good faith, he ought to provide against, he is liable for any accident arising therefrom."

Then, after citing two cases from other states, Mr. Justice Gordon said:

"In both these cases, the defects, from which the accidents arose, were known to the employees, but as they were injured in the discharge of duties imposed upon them by their employers, such knowledge was adjudged not to raise a presumption of concurrent negligence. This doctrine is obviously just and proper."

That the Pennsylvania courts do not consider them convertible terms is well illustrated in *Bowen vs. Penna. R. R. Co.*, 219 Pa. 405, decided January 6, 1908, and wherein Mr. Justice Eakin, delivering the opinion of the whole court, says:

"In the consideration of this case some confusion has arisen in properly defining and understanding the doctrines of assumption of risk and of contributory negligence. *It should always be borne in mind that defenses growing out of these doctrines are separate and distinct*, resting upon entirely different grounds and not dependent upon each other. In *Priestly vs. Fowler*, 3 Mees. & W. 1, decided in 1837, and a leading case on this question, it was laid down as a principle that a

servant assumes all the ordinary risks which are incidental to his employment. Since that time this doctrine has been universally applied by the courts in which the common law is the prevailing system of jurisprudence. While the text-writers and the courts have not always given the same reason for the foundation of the rule, the weight of authority bases it upon the contractual relation existing between the parties. It seems but reasonable to hold that when one person enters the employ of another there is an implied contract that he assumes such risks as are ordinarily incidental to that employment, and to have notice of all such risks as are, or ought to be, open and obvious to a person of his experience. In theory, at least, the employe is presumed to have waived any right of action he might otherwise have for injuries received, if such injuries result from the risks and dangers of the employment in which he is engaged. He assumes this risk in advance at the very inception of his contract of employment, and it continues so long as that relation exists. In this state the law is settled that an employe, in accepting the employment, assumes all risks ordinarily incidental thereto, and all other risks, open and obvious, the dangerous character of which he has had an opportunity to observe."

Then, after showing that in that particular case the question of assumption of risk was not controlling, he says:

"The case is not controlled by the question of assumption of risk, but the right to recover depends upon whether appellant was guilty of contributory negligence. As has been hereinbefore stated *this is an entirely separate and distinct defense, in no way connected with or dependent upon the question of the assumption of risk. An injured party cannot recover if guilty of contributory negligence because by his own act he has intervened between the negligence of the defendant and the injury received in such a manner as to break the causal connection.* This is the theory upon which most of the authorities base the doctrine. In its application to the facts of a particular case it means that the complaining party cannot recover damages on account of injuries received, no matter if the evidence produced at the trial clearly shows the defendant to be guilty of negligence, if it also appears that the negligence of the injured party contributed to the injuries for which he asks to be compensated. *In other words, the law will not permit him to recover from some other party on the ground of negligence if his own act of negligence contributed to the*

injuries for which he seeks damages. It must then be determined whether the appellant here was guilty of contributory negligence."

In the still later case of *Jones v. American Caramel Co.*, 225 Pa. 644, decided in 1909, the court had before it the Pennsylvania statute of May 2, 1905 (P. L. 352), which, among other things, required that "machinery of every description shall be properly guarded," and practically denied to defendant the defence of assumption of risk, Mr. Justice Brown, who delivered the opinion, saying:

"The act of 1905 will become a dead letter if an employer who has failed to properly guard his machinery can relieve himself from that duty by the plea that the danger was so obvious that his injured employe ought to have been aware of it and was not entitled to any warning against it. Only the contributory negligence of an injured employe, lawfully employed, will relieve the employer from the consequences of his disregard of his statutory duty. The assignments of error are all overruled and the judgment is affirmed."

In the still later case of *Valjago vs. Carnegie Steel Co.*, 226 Pa. 514, decided in 1910, the Supreme Court of Pennsylvania held, as stated in the syllabus, that—

"The defense of assumption of risk is not open to an employer whose employe is injured through a neglect to provide safeguards required by the Act of May 2, 1905, P. L. 352,"

and a verdict and judgment against the Steel Company were affirmed. Many cases might be cited, but it must be apparent from these that the distinction between assumption of risk and contributory negligence is well understood and enforced in the courts of Pennsylvania.

The "erroneous views of the statute," referred to by Mr. Justice Holmes, were understood to refer to the holding by the trial Judge (Thomas, P. J., of the Court of Common Pleas of Crawford County, specially presiding) that as the steam shovel "was not a car used in interstate commerce or other kind of traffic," it was not within the provisions of section 2 of the Act of 1893. If that was an error it has not

been followed in this instance, for the distinguished President Judge Reed, of the Jefferson County Court, who presided over the second trial, says (Record, 35):

"If it were an open question, I would be inclined to the opinion that this steam shovel, which was not and could not be used for transporting purposes, was not a 'car *used in moving interstate traffic*,' within the meaning of the statute, which is penal in its character and to be strictly construed. But it has been decided otherwise in this very case, and therefore I accept the decision as final."

In the majority opinion of this court in the former case it was said (p. 8):

"Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose."

While it was so stated in plaintiff's paper book, the statement was not supported by the evidence. Nothing of the kind appears in the evidence either in that case or the present one. As matter of fact, he was not ordered to make the coupling at all.

In the former case Mr. Justice Holmes, in the majority opinion, further said (p. 13):

"To recur for a moment to the facts, the only ground, if any, on which Schlemmer could be charged with negligence is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company require to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel car as he did, and his orders contemplated that he should do so."

That language is quoted for the purpose of more readily pointing out the distinction between that case and the present one, which is very much stronger on the ground of contributory negligence. If the double warning to keep his head down was then, it is not now, the only ground upon which he is chargeable with contributory negligence. Schlemmer was

thrice warned that if he attempted the coupling the way he did he must keep his head below the overhanging platform of the steam shovel, but what is even more important he was twice warned and instructed not to make the coupling at all by having the train backed up against the caboose. In both instances he treated the warning with contempt.

James Casey, first called by plaintiff, not an employe of defendant, but who had been for two years in charge of and operating the steam shovel, testified (p. 119) that *en route* from Limestone there had been stops made at several places and at one, at least, a coupling had been made between the steam shovel and a caboose. This was at Bradford, where, instead of backing a long train against the caboose, the train was allowed to stand motionless while the caboose was pushed gently by hand against the steam shovel. Casey testifies that he and Schlemmer were sitting in the caboose, the latter cleaning lamps, "and just then he saw the train coming down—backing up; and he left the work that he was doing stand, and he got out on the front part of the caboose. I said 'We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make.' He got down on the ground—

"Q. What reply did he make?

"A. He got down on the ground, and he said 'Oh, hell; back up.' And then the conductor came and inserted the pin slantways, and stepped back and gave the signal to back up slowly.

"Q. How did the train come back?

"A. Slowly.

"Q. Did it stop before it reached there?

"A. Yes, sir; it stopped while conductor Neilson was setting the pin.

"Q. How far was the end of the draw bar from the knuckle of the caboose coupler when it stopped?

"A. I judge 8 or 9 feet, as near as I can recall. I did not measure it.

"Q. Have you seen this steam shovel coupled prior to this time and since?

"A. Yes, sir; prior and since.

"Q. How often?

"A. I had charge of it from Butler, the previous year, to Youngstown, Ohio, and I saw it coupled three times on that route. And the next day the parties in Punxsutawney coupled it.

"Q. Have you seen it coupled while you were at work?

"A. Oh, yes, we used to couple coal cars to it.

"Q. Frequently or otherwise?

"A. I could not just say frequently. A couple of times, I guess.

"Q. As to making the coupling by pushing the caboose up by hand—what do you say as to the safety of that?

"A. I think it would be a very safe plan.

"Q. Would there be any danger connected with it?

"A. Not any more than there is in riding on a passenger train. There is danger in that on some railroads."

He further testified that after the death of Mr. Schlemmer they pushed the caboose up with the yard engine and coupled it without any trouble. He says that he had seen a great many steam shovels with similar couplings, but he had never seen any trouble in coupling them; that the coupling could be made safely, with care; that while a dangerous coupler, it was simple and that there was nothing about it that an experienced brakeman could not see at a glance (p. 146).

Harry C. Coates, the yard conductor, in charge of the shifting crew, testified as follows (p. 136):

"Q. I want you to state where you were standing when the accident occurred?

"A. I was standing on the left hand side of the track going south.

"Q. How far from Mr. Schlemmer?

"A. I should judge I was about 15 or 20 feet away from him. He was on one side of the track and I was on the other.

"Q. Did you have any conversation with him just before the accident occurred?

"A. Just before the cars got together I walked up to him, or I walked up to the caboose, and I told him that they had better shove that caboose on by hand. He said, 'Never mind. I will make this coupling.' 'Well,' I said, 'you will have to get down.' And as the cars got still closer together I saw he was too high. He got down in the first place; and he got down again. But in raising the link he raised his head.

"Q. Did you call to him twice to get down?

"A. Yes, sir.

"Q. If he had obeyed your directions would he have been hurt?

"A. I don't think he would, no.

"Q. Then you called to him twice to get down?

"A. Yes, sir.

"Q. How long a time was the second time before he was injured?

"A. Not more than a second, probably a couple of seconds, or something like that.

"Q. And the first time was how long?

"A. They were probably 15 or 20 feet away from the caboose at that time.

"Q. But how long was it before the accident occurred that you told him the first time that he would have to get down and keep down?

"A. The cars were then 10 or 15 feet apart, the steam shovel and the caboose.

"Q. They stopped the train after the first time you told him, did they?

"A. It just came to a stop, and started right away again.

"Q. Did you have a sufficient crew to push the caboose up by hand?

"A. There were three men there.

"Q. Had you your yard crew in the neighborhood?

"A. Yes, sir, the yard crew stayed right near there.

"Q. How many men had you there?

"A. I had three men.

"Q. Mr. Casey was there?

"A. Yes, sir.

"Q. And Mr. Neilson?

"A. Yes, sir.

"Q. Were there any brakemen on the train, besides?

"A. On the freight train?

"Q. Or Neilson's train.

"A. Yes, sir, he had two men that I knew of.

"Q. Was there plenty of force to shove the caboose up by hand?

"A. Yes, sir.

"Q. Was that a safe way of making the coupling?

"A. It would have been a great deal safer than backing onto it.

"Q. And when you suggested this to Mr. Schlemmer he said, 'Never mind. I will make the coupling?'

"A. Yes, sir.

"Q. Had he been talking to Mr. Casey immediately before that?

"A. Indeed I could not say that.

"Q. How long had you known Mr. Schlemmer?

"A. I should judge about five or six years.

"Q. Was he a competent brakeman?

"A. Yes, sir, so far as I knew.

"Q. Did he understand how to make this coupling without instructions?

"A. He had ought to, yes, sir.

"Q. Was it simple?

"A. Yes, sir."

In Judge Reed's opinion upon defendant's motion for judgment *non obstante veredicto* he says (32):

"The testimony on the former trial, however, did not so clearly show this negligence as it does on the present trial, and it therefore admitted of a contention which was not warranted, on which the final decision of the case was based, and which is now shown to be groundless. It was contended then and is contended now that the injury to the deceased is chargeable to the assumption of risk, and was the result of his miscalculating the height of the car behind him by an inch, while, in a crouching position, he was attempting to make the coupling as his duty required him. If his duty required him, in making the coupling, to be in the position, which he voluntarily and, according to the testimony, unnecessarily placed himself, and he exercised ordinary care and prudence, according to the known dangers of such position, his miscalculating the height of the car by an inch or more would admittedly be involved in assumption of risk. But the fact is, and the evidence now before the court clearly and unequivocally shows that the deceased went about the performance of his duty in a very careless and indifferent manner, and without any necessity whatsoever took a position involving the greatest possible danger in attempting to make this coupling. In order to make it, it was necessary for him to get down under the shovel car, between the rails of the track, and to raise the draw bar on the shovel car 5 or 6 inches and guide it into the slot in the automatic coupler on the caboose. If he had done this he could not have been injured in the manner that he was. There was plenty of room under the projection of the shovel car for him to operate the draw bar, and the raising of his head or

his body could not have resulted in anything more serious than coming in contact with the bottom of the car, or with this false work overhanging the draw bar which projected about 3 feet beyond the truck of the car. This projection on the shovel car was manifestly a protection against injury in making the coupling, and not a source of danger as contended on the part of the plaintiff. It does not require direct proof, or the opinion of experts, to establish this fact. But if necessary it may be found in the testimony of the train conductor, Mr. Neilson, who testified that if the deceased had stayed 'back under this shovel car, this part that projected out, there would have been no chance for him to get caught.' Again—the coupling could be made by a man holding his head down underneath this false work, the same as I did. I made the coupling and my head is not crushed.'

"The deceased in the face of repeated warnings to keep down, and to be careful not to get caught between the ends of the cars, took a position which it was not necessary for him to take and which exposed him to the very danger against which he was warned. He took hold of the caboose with one hand and of the draw-bar on the shovel car with the other hand, and thus negligently and unnecessarily put himself in a position that if he raised up above the bottom of the cars he would be caught between the ends of the same. In this he was guilty of negligence contributing to his injury, which, under the settled law of this state, bars a recovery for damages on account of such injury.

"In the second place he was told how this coupling had been made at Bradford, by pushing the caboose by hand against the shovel car, and was told that it was a difficult and dangerous coupling to make and that the safe way to make it was by pushing the caboose up by hand against the shovel car. This method of making the coupling was unquestionably the safer way to make it, and inasmuch as the deceased had the necessary assistance at hand to make it in this way, it was his duty to pursue the safer course, and a failure to do so fixes him with such negligence as bars a recovery. It is common sense as well as law that if an employe has a choice of ways known to him of doing a thing, one safe and the other unsafe, he is required to take the safe way of doing it. If he voluntarily takes a risk to which his employment does not necessarily expose him, it is negligence on his part, and if injured thereby he has no one but himself to blame. The question of assumption of risk is injected into this case without any evidence to support it. The risk of injury which the deceased took in this case was not

involved in his contract of employment. It was one that he deliberately created for himself. Conceding that it was his duty to make this coupling, it was equally his duty to exercise ordinary care and prudence in its performance. In this latter duty he utterly failed, and without any necessity therefor exposed himself to a risk and danger that was imminent, which by the exercise of ordinary care and prudence he could have and should have avoided, and because he did not do so was injured. This certainly is negligence, and is clearly distinguishable from assumption of risk, or a risk necessarily incident to the employment in which he was engaged. Before the question of assumption of risk could fairly arise in this case, it is necessary to assume, contrary to the evidence, that the deceased undertook to make this coupling in accordance with the express instructions of the defendant, or else by its implied instructions in that he was discharging a duty of his employment in the way and manner that he was expected or required to perform the same."

Harry C. Neilson, who for the past five years has not been in defendant's employ, but was at the time in charge of the train, testified (p. 125) that he instructed the deceased by saying to him "Mr. Schlemmer, you be very careful now and keep your head down low so as not to get mashed in between those cars."

"Q. Had he obeyed your instructions to keep down could the accident have occurred?"

"A. No, sir."

So that there were not only three who instructed him to keep down below the overhanging platform of the shovel car, but two who advised him to make the coupling in the absolutely safe way in which it had previously been made, by pushing the caboose gently up against the shovel, instead of pushing the whole train up against the shovel by means of an engine, which was at least 17 cars distant. His contemptuous "Never mind, I will couple this coupling" and "Oh, hell, back up" disregard of warning and instruction was the cause of his death. There could hardly be a clearer case of contributory negligence. There was absolutely no conflict of evidence upon that point. Under the Pennsylvania practice judgment

was properly entered *non obstante veredicto*, but in any event, whether the question of contributory negligence should have been decided by the Court or by the jury, is not a federal question, nor one reviewable here in a case not originally tried in a federal court.

THE STATE COURT, HAVING DECIDED THE CASE UPON THE SINGLE GROUND OF CONTRIBUTORY NEGLIGENCE, WHICH DOES NOT PRESENT A FEDERAL QUESTION, ITS JUDGMENT IS NOT REVIEWABLE HERE, EVEN THOUGH ANOTHER ISSUE PRESENTING A FEDERAL QUESTION WAS RAISED.

The issue whether defendant was, in view of the Act of 1893, entitled to the defence of assumption of risk, would, of course present a federal question. That federal question was decided in favor of plaintiff. (See answers to plaintiff's 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th and 11th points, Record 158.) But the court below has not based its judgment upon that ground. It has rested it solely and exclusively upon the ground of contributory negligence, which does not involve a federal question.

In *Adams County vs. Burlington & Missouri R. R. Co.*, 112 U. S. 123, this court distinctly laid down the law which is thus stated in the syllabus:

"When a record shows that two questions are presented by the pleadings, one federal and one non-federal, and that the judgment below rested upon a decision of the non-federal question, this court has no jurisdiction to review that judgment."

To the same effect are *Chouteau & Another vs. Gibson*, 111 U. S. 200; *Murdock vs. Memphis*, 20 Wall. 590, 636.

In *Jenkins vs. Loewenthal*, 110 U. S. 222, the law is thus stated in the syllabus:

"When the record discloses two defences to an action brought in a State court, one presenting a federal question,

and one presenting no federal question, either of which if sustained was a complete defence to the suit, and that the State court gave judgment in favor of the defendant on both, and the cause is brought here by writ of error, this court will affirm the judgment below without considering the federal questions."

In *Hale vs. Akers*, 132 U. S. 554, it was held that where the Supreme Court of a State decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed, without considering the federal question. On page 564, Mr. Justice Blatchford said:

"After contending that the court below erred in its decision of the Federal question; that such decision was based upon the facts (1) that the land in dispute was a portion of the pueblo land, and (2) that the lines of the survey of the Huichica grant did not conform to the decree of confirmation; and that, in so doing, the court ignored (1) the power of the Mexican government to divest the pueblo title, and (2) the findings of the lower court that the survey did conform to the decree; the plaintiffs urge that the interpretation by that court of the agreement between Schell and Akers was incorrect, and that it would not have so interpreted the agreement had it not been for its erroneous deduction of law regarding the Federal question, and, therefore, that the decision of the Federal question was the controlling decision of the case.

"But we cannot take this view. Both of the courts below decided that, irrespective of the Federal question, the agreement of October 11, 1860, was decisive of the case. The construction of that agreement involved no Federal question, and controlled the whole case.

"In *Murdock v. City of Memphis*, 20 Wall. 590, 636, this court announced, as one of the propositions which flowed from the provisions of the second section of the act of February 5, 1867, 14 Stat. 386, embodied in section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a Federal question was erroneously decided against the plaintiff in error, the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue

raised by the Federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

"This principle has since been repeatedly applied. In *Jenkins v. Lowenthal*, 110 U. S. 222, where two defences were made in the state court, either of which, if sustained, barred the action, and one involved a Federal question and the other did not, and the state court in its decree sustained them both, this court said that, as the finding by the state court of the fact which sustained the defence which did not involve a Federal question was broad enough to maintain the decree, even though the Federal question was wrongly decided, it would affirm the decree, without considering the Federal question or expressing any opinion upon it, and that such practice was sustained by the case of *Murdoch v. City of Memphis*, *supra*. See, also, *McManus v. O'Sullivan*, 91 U. S. 578; *Brozen v. Atwell*, 92 U. S. 327; *Citizens' Bank v. Board of Liquidation*, 98 U. S. 140; *Chouteau v. Gibson*, 111 U. S. 200; *Adams County v. Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit City Railway v. Guthard*, 114 U. S. 133; *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18; *De Saussure v. Gaillard*, 127 U. S. 216, 234.

"It appears clearly from the opinion of the Supreme Court that it was not necessary to the judgment it gave that the words 'taking the direction of the Arroyo Seco' should be construed at all. It is, therefore, of no consequence whether or not that court was wrong in its conclusions as to the meaning of the Huichica grant."

See *Detroit Railway Co. vs. Guthard*, 114 U. S. 133; *N. O. Waterworks vs. La. Sugar Company*, 125 U. S. 18; *De Saussure vs. Gaillard*, 127 U. S. 216-233.

In *Eustis vs. Bolles*, 150 U. S. 361-366, Mr. Justice Shiras, delivering the opinion of the court, said—

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

In *Rutland Railroad vs. Central Vermont Railroad*, 159 U. S. 630, on page 640, Mr. Justice Gray said:

"It is well settled, by a long series of decisions of this court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question."

In *Israel vs. Arthur*, 152 U. S. 355, the Supreme Court held that it had no jurisdiction to revise the decision of the highest court of a state, in an action at law, upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way.

The trial judge, having found that plaintiff was not entitled to recover because of the contributory negligence of the deceased, and the Supreme Court of Pennsylvania having affirmed the judgment upon that ground alone, there is nothing to which the jurisdiction of this court can attach.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE ARE SEPARATE AND DISTINCT DEFENSES—THE ACT OF 1893 RELATES TO THE FORMER ONLY—IT DOES NOT TAKE AWAY THE LATTER.

The 8th section of the Act of Congress of March 2, 1893, (27 Stat. L., 531) declares—

"That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act, *shall not be deemed thereby to have assumed the risk* thereby occasioned, although taken in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Except for the Act of 1893, defendant would have been entitled to the defence of assumption of risk, even though deceased had not been guilty of contributory negligence.

"The servant, or employe, assumes the risk of all dangers,

however they may arise, against which he may protect himself by the exercise of ordinary observation and care. Furthermore, the master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty." *Pgh. & Connellsville R. R. Co. vs. Sentmeyer*, 92 Pa., 276-280.

To the same effect are *Moore vs. Penna. R. R. Co.*, 167 Pa. 495-497; *Auburn vs. Tube Works Co.*, 14 Superior Court, 568-570; *Rooney vs. Carson*, 161 Pa. 26-27; *Benisch vs. Roberts*, 143 Pa. 1.

If the Act of 1893 applied to this case at all, it simply took away from defendant that single ground of defence, namely, the assumption of risk by the employe. But the Act in no way interferes with, touches or relates to, the defence of contributory negligence. That is left precisely as it was before the Act of 1893 was passed.

It is a rule of universal application, sustained by hundreds of decisions, that recovery by a plaintiff is precluded where his or her own negligence has proximately contributed to his or her own injury. It is sufficient to refer to *Washington & Georgetown R. R. Co. vs. McDade*, 135 U. S., 554; 7 Am. & Enc. of Law, 371; *Sunney vs. Holt*, 15 Fed. Rep., 880; *Motey vs. Pickle M. & G. Co.*, 74 Fed. Rep., 155.

Had it been the intention of Congress, in the passage of the Act of 1893, to take away every defence, that intention would have been clearly expressed. The fact that it specifically mentions one defence, namely, assumption of risk, and omits the mention of any other, is conclusive that no other defence was intended to be taken away. *Expressio unius est exclusio alterius*. It is contended that, in a case to which the act of 1893 is applicable, the employer is deprived entirely of the defence of the employe's assumption of the risk—a defence which otherwise would be very effective. But a distinction between "assumption of risk," and "contributory negligence" has always been clearly drawn.

In *Union Pacific Ry. Co. vs. O'Brien* 161 U. S., 451-456, Chief Justice Fuller, delivering the opinion of this court said:

"That the second instruction was properly refused because it confused two distinct propositions, that relating to the risks assumed by an employe in entering a given service and that relating to the amount of vigilance that should be exercised under given circumstances."

In *Choctaw, Oklahoma R. R. Co. vs. McDade*, 191 U. S., 64, Mr. Justice Day, delivering the opinion of this court, said:

"The question of assumption of risk is quite apart from that of contributory negligence."

In *Narramore vs. Cleveland C. C. & St. L. Ry. Co.* (C. C. A., Sixth Circuit), 96 Fed. Rep. 298-304, these two grounds of defence were considered and discussed by an eminent jurist, (now President of the United States), who said:

"The Knisely case, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employes worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or non-action in disregard of personal safety by one who treating the known danger as a condition, acts with respect to it without due care of its consequences."

Again, on the same page:

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appre-

ciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences."

In *St. Louis Cordage Co. vs. Miller*, 126 Fed. Rep., 495, (C. C. A. 8th Circuit), Circuit Judge Sanborn very fully discusses the distinction between assumption of risk and contributory negligence. On page 502 he says:

"The truth is, that while assumption of risk and contributory negligence both apply to prevent a recovery in cases in which the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur, they are neither identical in effect nor coincident in extent, and the latter has no application and constitutes no defence in that great majority of cases in which assumption of risk is an impregnable bar to a recovery where prudent persons assume the obvious dangers of their employments which are neither imminent nor great. Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort. Contributory negligence is no element or attribute of assumption of risk. The latter does not prevail because the servant was or was not negligent in making his contract and in exposing himself to the defect and danger which injured him, but because he voluntarily agreed to take the risk of them. No right of action in his favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from.

"This clear distinction between assumption of risk and contributory negligence has been repeatedly announced and constantly maintained in the federal courts and in most of the courts of the States. The law upon this subject which controls this case and all cases of this character in the federal courts is stated in *Washington, etc., R. R. Co. v. McDade*, 135 U. S. 554, 570; 10 Sup. Ct. 1044; 34 L. Ed., 235, in the

quotation which follows, and so far as our investigation has extended, the rules of law thus announced have never been disregarded or modified by that court in any subsequent decision:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances, for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been known to him, and was unknown to the employee or servant. But if the employee knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And further, if the employee himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer.'

"Here the two defences of assumption of risk and contributory negligence are separately stated and the first failed because the servant 'did not know that the belt in which he was caught had been recently and perhaps imperfectly repaired,' and 'was wholly unaware of the danger attendant upon putting on the belt by hand,' while the defence of contributory negligence failed because the defendant failed to satisfy the jury that the servant was not exercising ordinary care in placing the belt upon the pulley."

Again on page 505 he says:

"The unavoidable logical deduction from the principles and decisions to which we have adverted is that assumption of risk and contributory negligence are distinct and independent defences, that the former rests in contract and upon the

maxim, *Volenti non fit injuria*, and is not conditioned or limited by the probability or improbability, the imminence or the remoteness, of the danger from the risk assumed, or by the existence or by the absence of contributory or other negligence on the part of the party who undertakes to assume the risk, while contributory negligence is founded upon an absence of ordinary care which causes or contributes to the injury which is the basis of the suit. This conclusion is fortified by the numberless decisions in which the defence of assumption of risk has been sustained in which the plaintiffs were not guilty of contributory negligence, cases in which prudent persons in the exercise of ordinary care would have assumed and ordinarily did assume the very risks which were the subjects of the actions."

In *Hesse vs. R. R. Co.*, 58 Ohio St., 167, the Supreme Court said:

"Acquiescence with knowledge, is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten."

In *Miner vs. Railroad Co.*, 153 Mass., 398, the distinction was recognized in holding that where a plaintiff was guilty of no contributory negligence, nevertheless he might be barred from a recovery by assumption of the risk.

In *Cleveland, C. C. & St. L. Ry. Co. vs. Baker*, (C. C. A., 7th Circuit), 91 Fed. Rep., 224, the distinction is sharply drawn and flatly recognized.

Since, then, "assumption of risk" and "contributory negligence" are separate and distinct matters, the provision in the Act of 1893 that no employee of a common carrier, who may be injured by any car in use contrary to the provisions requiring automatic couplers, shall be deemed to have assumed the risk occasioned thereby, can have no effect on the general principle of law that recovery by a plaintiff is precluded where his own negligence has proximately contributed to and, as in this case, caused his own injury. Not only is this the conclusion that must be drawn from the principles stated, but the courts, in many decisions, have held this to be the law. With

the exception of two or three decisions by a divided Supreme Court of North Carolina, all the cases hold that where the plaintiff was contributorily negligent, he cannot recover even though the defendant was disregarding statutory requirements.

In *Winkler vs. Phila. & R. R. Co.*, 53 *Atl. Rep.* 90, this question was squarely presented to the Superior Court of Delaware. Winkler had been injured by coupling cars not automatically equipped, as required by the Act of Congress of 1893. Whether or not he had himself been negligent was a disputed question. The court held that if he had himself been negligent he could not recover, although the company had violated the Act of 1893 by not having its cars equipped. Lore, C. J., delivering the opinion said:

"If at the time of the accident, the defendant was using such a coupler, which was prohibited by the Act of Congress, it was guilty of negligence per se; and, if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and, if not so equipped, the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge. If, however, in using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he cannot recover, notwithstanding the fact that the coupling was unlawful. In such case he must take the consequences of his own contributory negligence." * * * "It is the duty of the servant, as well as of the master, to exercise care and prudence in all cases commensurate with the risk or danger of the employment. Therefore, if the plaintiff contributed to the accident by his own negligence, he cannot recover. Where contributory negligence is relied on as a defence, however, the burden of proving such negligence is upon the defendant."

This case was affirmed in the Supreme Court of Delaware, June 19, 1903, 56 *Atl. Rep.* 112, Boyce, J, at the close of the opinion said:

"If at the time of the accident, the defendant was using such a coupler, which was prohibited by the Act of Congress, it

was guilty of negligence per se; and, if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and, if not so equipped, the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge.

"We are of the opinion that the judgment of the court below should be affirmed."

In *Cleveland C. C. & St. L. Ry. Co. vs. Baker*, (C. C. Appeals, 7th Circuit), 91 Fed. Rep., 224, a brakeman was injured by reason of the cars not being equipped with grabirons as required in Section 4 of the Act of 1893. The Court held that if the brakeman was guilty of contributory negligence, he could not recover. On page 228, Circuit Judge Woods said:

"We are of opinion that this question is substantially the same as if the railroad companies voluntarily and without legislative requirement had been accustomed to use grab-irons, and cars without them were known to be defective, and correspondingly more dangerous to one attempting to couple or uncouple them. The meaning of the act is that, by remaining in his employment, the servant does not assume the risks generally incident to the absence of such irons, but not that in a particular case of voluntary action, with full knowledge of the situation, the character of the act is not to be determined according to all the facts and circumstances. The known absence of the grab-irons was a circumstance in this case which the jury should have been directed to consider in determining whether the defendant in error was guilty of contributory negligence, or intended to assume the risk of the attempt to uncouple. A contrary construction of the act would permit a brakeman to take the risk of coupling or uncoupling cars not supplied with hand holds under circumstances of extreme and well understood danger, with the conscious purpose of holding the company for the result."

This precise question is clearly decided in *Denver & R. G. R. Co. vs. Arrighi*, 129 Fed. Rep., 347, (C. C. A., 8th Circuit). Arrighi had his hand smashed in coupling cars engaged in

interstate commerce, which cars were not provided with automatic couplers as required by the Act of 1893. He did not deny his contributory negligence, and rested his whole case on the failure of the railroad company to provide automatic couplers. Circuit Judge Hook, delivering the opinion, said (p. 347):

"The trial court denied a request of the defendant that the jury be instructed to return a verdict in its favor for the reason that the plaintiff was guilty of negligence contributing to his injury. The action of the Court in that respect is assigned as error. Prior to the time when the Act of Congress became fully operative, the employees of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common law doctrine of assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employees shall no longer rest under the burden of that assumption in respect of any car used contrary to its provisions. While this is true, the railroad company is not thereby deprived of the defence of contributory negligence. With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employee are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employee by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employee himself. The rationale of the doctrine of assumption of risk, is not that which supports the rule of contributory negligence. They operate differently and are dependent upon widely different principles. It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defence of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements."

The Act of March 23, 1888. (85 Ohio Laws, p. 105), re-

quired every railroad company to adjust, fill or block the frogs, switches, and guard rails on its tracks, and provided a penalty for failure so to do. The Cleveland, C. C. & St. L. Ry. Co., did not comply with the provisions of the statute, and as a result of such failure Marramore was injured. In his suit, he relied on the failure of the railroad company to comply with the statute. The case is reported in 96 *Fed. Rep.* 298, (C. C. of Ap., 6th Circuit). Circuit Judge Taft, delivering the opinion, said (p. 304):

"Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defence to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of *Krause v. Morgan*, 53 *Ohio St.* 26, 40 *N. E. R.* 886, where the employee, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from danger. In *Railway Co. v. Craig*, 19 *C. C. A.* 631, 73 *Fed. Rep.* 642, we held that the *Krause Case* was one of contributory negligence, and followed it as such. The syllabus confuses the difference between the assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The following cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: *Coal Co. v. Estievenard*, 53 *Ohio St.* 43; *Coal Co. v. Muir*, 20 *Col.* 320; *Holum v. Railway Co.*, 80 *Wis.* 299; *Grand v. Railroad Co.*, 83 *Mich.* 564; and *Taylor v. Manufacturing Co.*, 143 *Mass.* 470. In the last two cases the distinc-

tion between contributory negligence and assumption of risk is clearly referred to.

"For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant company to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom."

Lake Erie & W. Ry. Co. vs. Craig, 73 Fed. Rep., 642, is another case based on a violation of the Ohio Statute (named in the preceding case), requiring frogs to be blocked. Circuit Judge Taft on page 643 says:

"The liability of the defendant railway company was asserted by the plaintiff on the ground that it had failed to block a railway frog in its yard at Lima, in violation of a statute of Ohio, passed March 23, 1888 (85 Ohio Laws, 105), requiring all railway corporations operating railways in the state to block or fill such frogs, for the safety of their employees, and imposing a punishment for failure to do so. We have already held, in *Railroad Co. v. Van Horne*, 16 C. C. A. 182, 69 Fed. Rep. 139, that the effect of this statute is to make a failure by a railroad company to comply with it negligence, as a matter of law. This is the ruling of the supreme court of Ohio in construing an analogous statute enacted to compel mine owners to adopt safety appliances for their employees. *Krause v. Morgan* (Ohio Sup.), 40 N. E. 886. The statute does not, however, prevent the master, in such cases, from escaping liability, if the employee injured by the master's non-compliance with the statute is himself guilty of contributory negligence. This is expressly ruled by the supreme court of Ohio in the case cited, where, after an elaborate review of the authorities in other states, Judge Speer, speaking for the court, sums up its conclusions as follows:

"While the statute, as we construe it, does not make the operator of the mine absolutely liable to a party injured by an explosion of gas, where the operator has not complied with the statute, such conduct is negligence per se, and the employer cannot escape liability by showing that he took other means to protect the workmen, equally efficacious. Proof of failure to obey the statute is all that is necessary to establish negligence on the part of the operator, but the statute does not change the well-established rule that, where one has been

guilty of negligence that may result in injury to others, still the others are bound to exercise ordinary care to avoid injury.'"

In *Hodges vs. Kimball*, 104 Fed. Rep., 745, a case directly in point, handholds or grab-irons were not provided as required by Section 4 of the Act of Congress of 1893—the identical act here involved. It was held that this neglect of statutory duty did not preclude the defence of contributory negligence. On page 752, District Judge Purnell said:

"The absence of the handholds or grab-irons does not appear in any sense to have been the approximate cause of the injury. The evidence is that these irons were missing from the opposite side of the car from which decedent entered. If they had been on the car on that side, they could not have aided him. The Act of Congress, which is not referred to in either brief or invoked by the plaintiff, requires railroads doing interstate commerce to provide handholds or grab-irons in the ends and sides of freight cars (27 Stat. 531), but a failure to provide such grab-irons does not excuse a brakeman from a failure to use ordinary prudence in a particular case, where he observes the absence of such appliances; nor does this act change the rule as to the liability of the master where the failure to comply with the statute was not the cause of the injury."

In *Dixon vs. Western Union Tel. Co.*, 68 Fed. Rep., 630, the law is thus stated in paragraph 3 of the syllabus:

"The statute of Indiana (Act March 4, 1893) providing that 'every * * * corporation * * * shall be liable in damages for personal injury suffered by an employee while in its service * * * where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation' * * * does not impose liability upon the employer for injuries resulting from the act or omission of the person injured."

That a violation of statutory duty does not preclude the defence of contributory negligence, is held by the Supreme Court of Vermont, in *Kilpatrick vs. Grand Trunk Rwy. Co.*,

27 *Am. & Eng. R. R. Cases*, annotated, 945. A ladder was maintained on the side of a car contrary to statute, and a switchman while using it was knocked off. On page 952, Stafford, J., said:

"Yet it does not follow that an employee who is injured by reason of the neglect of his employer to comply with the statute, can recover under all circumstances. By the language of the statute, the right to recover is limited to injuries 'resulting from such neglect;' and, as this court has once decided in this very case, that means resulting from such neglect alone; and the plaintiff must, as in other actions of this character, show that his own negligence did not contribute to the injury. But the doctrine of contributory negligence is entirely separate and distinct in theory from the doctrine of assumption of risk, although, as a practical matter, the fact that the employee knew and appreciated the risk he was running may, in the circumstances, justify or even require a finding that he was guilty of contributory negligence; or the negligence may consist entirely in the manner in which the risk is met. To speak concretely, take this very case, the use of a side-ladder. They had been used by employees for years, and doubtless by such use the risk had been assumed. Now, by reason of the statute, the risk is not, and cannot be assumed. Yet the use of it, under the given circumstances, may be negligence, and may even be so gross as to be negligence as matter of law. The defendant here claimed that the plaintiff was guilty of contributory negligence as matter of law, and based the claim mainly upon the ground that the plaintiff knew the location of the post and the track, their nearness to each other, and the consequent danger to one riding by the post on a side ladder. The plaintiff admitted that he knew the location of the post and the rail in a general way, but denied that he knew the distance between the two, and testified that before the accident he did not know of any reason why one could not ride safely by the post on a side ladder; that he had never tried it or seen it tried, although he had ridden safely past other posts in the yard * * * Upon this testimony we are asked to say as matter of law that the plaintiff was guilty of contributory negligence. We think it was a question for the jury."

The above case was before the Supreme Court of Vermont twice, the first case being reported in 20 *Am. & Eng.*

R. R. Cases, annotated, 300. The law as stated there in the syllabus is,—

"That an instruction that the question of contributory negligence was not in the case was erroneous, since defendant's neglect to perform its statutory duty did not relieve plaintiff from proving that his own negligence did not contribute to his injuries."

In *Mobile J. & K. C. R. Co., vs. Bromberg*, 37 *Am. & Eng. R. Cases, annotated, 823*, (*Supreme Court of Alabama*), a brakeman was injured coupling cars not provided with automatic couplers. The tenor of the whole case shows that contributory negligence, if established, is considered a good defence.

In *Hollum vs. Chicago, Milwaukee & St. Paul Rwy. Co.*, 80 *Wis.*, 299, the law is thus stated in paragraph 2 of the syllabus:

"Ch. 123, Laws of 1889, requiring every railroad company to erect and maintain guards or blocks at every frog, and providing that the company shall be liable for all damages sustained by reason of its failure to do so, whether the person injured be an agent or servant of the company or not, and notwithstanding such failure may occur through the negligence of any other agent or servant thereof, does not take away the defence of contributory negligence."

In *Victor Coal Co. vs. Muir*, 20 *Col.*, 320, a statute required mine owners to securely prop dangerous places in mines. The mine owners neglected to do so, and Muir continued to work in what he must have known was an exceedingly dangerous place. He was injured by falling rock, and sued for damages. It was held that though the company violated the statute in not propping at this particular place, yet the plaintiff's continuing to work in the place, with the loose rock in full view, was such contributory negligence as to bar him from a recovery.

A statute of Massachusetts requires all openings of elevators and well holes upon every floor of a factory to be protected in a manner specified, and that any corporation shall be liable for all damages suffered by any employee by reason of a violation of the statute. In *Taylor vs. Carey Manufac-*

turing Company, 143 Mass., 470, it was held that notwithstanding the failure of the company to provide guards according to the statute, the plaintiff having been negligent, he could not recover.

A Michigan statute requires railroad companies to adjust, fill, or block the frogs, switches, and guard rails on their roads in such manner as to prevent the feet of employees from being caught therein. In *Grant vs. Mich. Cen. R. R. Co.*, 83 Mich., 564, the law is thus stated in paragraph 3 of the syllabus:

"The failure of a railroad company to comply with the provisions of said act will render it liable to an employee who is thereby injured, in a case where the law applies, if he is not himself guilty of negligence."

A statute of Mississippi requires that railroad trains shall not run at a greater speed than six miles per hour through towns and cities, and provides, further, that the company shall be liable for any damages or injury which may be sustained by any one from trains while running at a greater speed than six miles.

In *Vicksburg & Meridian R. R. Co. vs. McGowan*, 62 Miss. 682, a case in which an injured party was trying to recover damages because the train which injured him was running more than six miles an hour, while in a town, the Supreme Court, Campbell, C. J., delivering the opinion, said on page 694:

"We hold the law to be that, even where a railroad company violates the statute under consideration, one who could by the exercise of ordinary care avoid injury from the act of the company cannot recover for such injury.

"There is in the books much confusion on the subject of contributory negligence. The principle on which the doctrine rests is that the plaintiff cannot recover for the negligence of another if, by ordinary care, he could have avoided injury from such negligence. Contributory negligence is the want of ordinary care to avoid injury from the act of another. One must use due diligence or ordinary care to avoid injury from another, failing in which he may not recover for what by such diligence or care he might have avoided. Whether in any

case the plaintiff used the requisite care to avoid injury depends on the circumstances in which he was called on to act.

"One who contributes directly to his own injury, by a failure to exercise the ordinary care which would have saved him from harm from the negligence of another, is denied the right to recover, because the law will not undertake to apportion the blame between parties mutually in fault.

"In this case the plaintiff was on the track of the defendant when he was struck by a locomotive and injured. Although he may have been improperly on the track where he was, and although the defendant may have been a wrongdoer by violating the statute as to the rate of speed, the plaintiff is not entitled to recover, if notwithstanding the wrong of the defendant, he could by ordinary care have avoided injury from the act of the defendant."

In *Mobile & Ohio R. R. Co. vs. Stroud*, 64 Miss. 784, in a similar case, Mr. Justice Arnold, on page 792, said:

"A man who voluntarily gets on a railroad track, sixty feet in front of a train moving toward him at a greater rate of speed than six miles an hour, at a point where there is nothing to obstruct the view or prevent him from seeing the train or leaving the track after he is on it, must take the consequences of his own negligence and folly. If injured by the train, under such circumstances, he is not more sinned against than sinning. He does not exercise reasonable or ordinary care. He cannot speculate or experiment, in such manner, with safety, on the chances of others being more prudent than himself, or of others taking better care of him than he does himself. The negligence of the railroad company in running its train at an unlawful rate of speed, was no excuse for the negligence of the deceased.

"It was decided in *V. & M. R. R. Co. v. McGowan*, 62 Miss. 682, that section 1047 of the code, which prohibits locomotives and cars from being run through towns, cities, and villages, at a greater rate of speed than six miles an hour, does not impose absolute liability on a railroad company for an injury done while the statute is being violated, without regard to the conduct of the person injured or the circumstances under which the injury occurred, and that even where a railroad company violates the statute, one who could by the exercise of ordinary care avoid injury by the act of the company, cannot recover for such injury."

In *Railroad Co. vs. Brooks*, 85 Miss., 269, in another similar case, Mr. Justice Truly, on page 274, said:

"That the employees of appellant were guilty of negligence is manifest. To run an extra freight train, at an unusual time, through a thickly settled part of a town, at a rapid rate of speed, in the night time, over frequented street crossings, and without giving any signal or ringing any bell must assuredly be deemed negligence. The appellee did not insist, nor did the court instruct, that such acts on the part of the railroad employees was gross negligence, but allowed the jury to pass on the question of whether the conduct of Brooks, the injured party, as disclosed by the testimony, was such as to constitute, under the circumstances of this case, contributory negligence. Manifestly, appellant has no ground of complaint on this score. It is contended that the facts of the case show beyond dispute that Brooks, the person injured, was guilty of such recklessness as to preclude recovery by appellee. But the conduct of Brooks at the time of the injury was of itself a controverted fact, and this and all other controverted facts must be submitted to the jury. This was done by the trial judge, and their determination was adverse to the contention of appellant. The jury, upon disputed facts, guided by fair and accurate instructions, having found that the negligence of appellant was the proximate cause of the injury, and there being some testimony to sustain that finding, we must decline on this ground to reverse the judgment, even though it may be granted that the question was one of doubt."

Section 193 of the Constitution of 1890, of Mississippi, provides that knowledge by employes of the defective or dangerous condition of machinery or appliances shall not be a defense, to a railroad company in any action for injuries caused thereby. It was held in *Buckner vs. Railroad Co.*, 72 Miss., 873, that this did not preclude the defense of contributory negligence. On page 877 Mr. Justice Campbell said:

"The averment of the declaration that the hand-car furnished him by his employer was defective in having a lever that made its operation dangerous to persons on it, and a broken wheel which led to serious consequences, and that these defects were the direct and immediate cause of the injury to the plaintiff, of which he complains, makes it sufficient to withstand a demurrer, although the declaration does not nega-

tive contributory negligence by the plaintiff, the rule in this State being that this defense is to be made by the defendant, unless it arises out of the case made by the plaintiff.

"The declaration shows that the plaintiff had knowledge of the defects in the hand-car, but the constitution of 1890 declares that knowledge by an employee of the defective or unsafe character or condition of any machinery shall be no defense, etc., section 193. The effect of this is not to destroy the defense of contributory negligence by a railroad company, but merely to abrogate the previously existing rule that knowledge by an employee of the defective or unsafe character or condition of the machinery, ways or appliances shall not, of itself bar a recovery. The law was that knowledge by an employee of defective appliances which he voluntarily used, precluded his recovery for an injury thus received. The Constitution destroys that rule, and the mere fact that the employee knew of the defect, is not a bar to recovery; but knowledge by an employee of defects is still an element or factor, and a very important one, in determining whether, with the knowledge he had, he used that degree of caution required in his situation with reference to the appliances causing his injury. The Constitution did not have the effect to free employees of railroad companies from the exercise of ordinary caution and prudence. It does not license recklessness or carelessness by them, and give them a claim to compensation for injuries thus suffered. They, like others not employees, must not be guilty of contributory negligence, if they would secure a right of action for injuries. The fact of knowledge of defects shall not be, as heretofore, a defense, but the same rule that applies to others applies to them. They must use the degree of caution applicable to the situation, for the absence of this is negligence, and, if it contributed to the injury, no recovery can be had by an employee any more than by one not an employee."

THE INTERSTATE COMMERCE COMMISSION, CORRECTLY INTERPRETING THE ACT OF 1893, NOTIFIED THE RAILWAY EMPLOYEES THAT SECTION 8 WOULD NOT RELEASE THEM FROM RESPONSIBILITY FOR THEIR OWN CONTRIBUTORY NEGLIGENCE.

That the construction placed upon the Act of 1893 by the Interstate Commerce Commission is in harmony with the principles laid down in the above cited cases is manifest from the

following paragraph copied from page 84 of the printed copy of its Fourteenth Annual Report, dated December 24, 1900, and signed by every member of the Commission, viz:

"It may well be repeated that a large number of the accidents to employees can only be attributed to carelessness.

"Impressed with the necessity of particularly directing the attention of the employees to this subject, the secretary of the Commission addressed a letter to the subordinate branches of various railway organizations calling attention, among other matters, to the necessity of greater care and caution on the part of railway employees in the discharge of their duties. It was also stated to be the understanding of the Commission that Section 8 of the act does not fully release them from responsibility for contributory negligence."

THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE WAS CORRECTLY
APPLIED BY THE PENNSYLVANIA COURTS IN THIS CASE.

Even if the ruling of the Pennsylvania courts upon the question of contributory negligence was reviewable here, it must be found in entire harmony with the rulings of this and all other courts.

In *Wash. & Georgetown R. R. Co. vs. McDade*, 135 U. S., 554, this court held, as appears from the syllabus, that—

"When a person employed by another to labor in connection with machinery, is wanting in such reasonable care and prudence as would have prevented the happening of an accident and is injured by the machinery, he is guilty of contributory negligence, and his employer is thereby absolved from responsibility for the injury, although it was occasioned by defect in the machinery and through the negligence of the employer."

In *Southern Pac. Co. vs. Seley*, 152 U. S., 145, this court held, as appears from the syllabus, that—

"After serving as a brakeman in the employ of a railroad company, S. became a conductor on the same railroad, and as such had been engaged at a depot yard at one of its stations at least once a week, and usually oftener, for seven years. While making up his train at that yard, preparatory to running out with it, after the chief brakeman had failed in an at-

tempt to make a coupling he tried to make it. There was an unblocked frog at the switch where the car was. He put his foot into this frog, and was told by the brakeman that he would be caught if he left it there. He took it out, but put it in again, and, being unable to extricate it when the cars came together, he was thrown down and killed. In an action brought by his administratrix against the railroad company to recover damages, held, that S. must be assumed to have entered and continued in the employ of the railroad company with full knowledge of any danger which might arise from the use of unblocked frogs; that he was guilty of contributory negligence; and that the company was entitled to a peremptory instruction in its favor."

Under the Act of Congress of 1893 the absence of automatic couplers does not make the company liable *per se* for damages to the injured party. It subjects the company to fine under the 6th section and the 8th section takes away the defence of the employee's assumption of risk. Beyond this the question of liability is determined by the rules and principles of law precisely as they existed prior to the passage of that Act. It does not permit an employe to recover damages for an injury which, as in this case, his obedience of orders would have rendered impossible.

WAS THE STEAM SHOVEL "A CAR USED IN MOVING INTER-STATE TRAFFIC," WITHIN THE MEANING OF THE ACT OF 1893?

The Act of 1893, in its 4th section, makes it unlawful for a railroad company "to haul, or permit to be hauled, or used upon its lines *any car used in moving interstate traffic* not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

This is a penal statute, section 6 imposing a penalty of \$100 for each and every violation; suit to be brought by the United States District Attorney. The holding by this court in *Johnson vs. Southern Pacific Co.*, 196 U. S., 1, that a locomotive

engine was included in the words "any car" does not seem conclusive of this case because the locomotive engine was "used in moving interstate traffic," whereas the steam shovel was not and could not be. Its only use and function is to shovel dirt.

"Q. As to this shovel: wasn't it simply a big machine on wheels?

"A. Yes, sir, it was a big machine on wheels. That is what it was.

"Q. It was not loaded on a railroad car, was it?

"A. No, I do not think so. I think it was a steam shovel, built right on the trucks.

"Q. Traveling on its own wheels?

"A. I believe so.

"Q. Was there any place on that shovel upon which to load merchandise or other articles of traffic?

"A. Not that I know of.

"Q. It was simply full of machinery—a steam engine and other machinery?

"A. Yes, sir." (Record, p. 56.)

And again (p. 119):

"Q. To whom did this steam shovel belong?

"A. T. F. Ryan, contractor.

"Q. What was this, a car or a steam shovel?

"A. It was a steam shovel.

"Q. Was there any room in it for passengers or any merchandise of any kind?

"A. No, sir.

"Q. For what was it used?

"A. For excavating.

"Q. Was it possible to use it for any other purpose?

"A. No, not except loading timber onto something else."

And again (p. 146):

"Q. You spoke of this being a car. Was there any car about it, Mr. Casey—or was it a machine?

"A. It was a machine, stationary, set on the body of a car. They are not cars. They are—

"Q. Shovels—straight; steam shovels?

"A. Yes, sir. There is nothing, hardly. There are holes

in the bottom of them to let the machinery protrude down through. You could not say it is a car in any way.

"Q. What was the name of this machine?"

"A. The Marion steam shovel. Barnhart was the maker of it.

"Q. Did it have any number on it corresponding to car numbers, or anything of that kind?"

"A. No, sir. The only number that was on it was the shop number. Every shovel that is turned out of the shop is numbered, from one upward."

"If it were an open question, I would be inclined to the opinion that this steam shovel, which was not, and could not be used for transporting purposes, was not a car *used in moving interstate traffic*, within the meaning of the statute, which is penal in its character and to be strictly construed. But it has been decided otherwise in this very case, and therefore I accept the decision as final." Trial Judge, p. 35.

As this steam shovel was built upon wheels, it may in one sense be termed a car, but can it properly be termed a car "used in moving interstate traffic," when it was not and could not be used for that purpose? It was manifestly not the intention of the Act of 1893 that the requirement of automatic couplers should apply to all cars even when used in moving interstate traffic, for in section 6 it was specially provided that the act should not apply "to trains composed of four-wheel cars or to locomotives used in hauling such trains," and before the second section, relating to automatic couplers, went into effect it was amended by the Act of 1896 so as to except trains composed of eight-wheel standard logging cars where the height of the car from the top of the rail to the center of the coupling did not exceed 25 inches, or the locomotives hauling such trains exclusively in the transportation of logs.

The supplementary Act of March 2, 1903, (37 Stat. L. 943) extended the requirements as to train brakes, automatic couplers, etc., "to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce." This would hardly have been necessary had the original Act of 1893 applied to all cars running on the rails. If the Act of 1903 be broad enough to include a steam shovel,

it must be remembered that the accident which resulted in the death of the plaintiff's decedent occurred three years before that act was passed and only four days after the date on which the Act of 1893 went into effect. The question now is, not whether the steam shovel comes within the designation of "similar vehicles used on any railroad engaged in interstate commerce," under the Act of 1903, but whether it was a "*car used in moving interstate traffic*," within the intendment of the Act of 1893. It plainly was not so used and could not have been so used. It was itself being moved by defendant as an article of freight as merchandise. A steam shovel contains powerful machinery by which a huge shovel is by the power of steam drawn, or forced, into a bank of earth, taking up a ton or more at a single dip. It is then swung by a heavy crane out over an empty dirt car. By the pressure of a button, or touch of a lever, the bottom of the shovel gives way and its contents drop into the car. As the work progresses additional rails are laid so that the shovel may, by the assistance of its wheels, reach its work precisely as the mowing machine, by means of its wheels, reaches the grass it is to cut. It is not used in moving traffic at all, but in shoveling dirt, making the excavations necessary in the construction of a railroad, or canal, or other similar work.

Those who heard the lecture of Colonel Goethals recently delivered in the hall of the House of Representatives saw a splendid moving-picture illustration of the operation of a steam shovel.

The Pennsylvania courts, following the ruling of this court in the former case, treated this shovel as within the intendment of the Act of 1893, but decided the case upon the ground of contributory negligence. It is not believed that their ruling upon that point will be disturbed here, but in the event that it should be, defendant would respectfully ask this court to reconsider its former ruling touching the application of the Act of 1893 to this shovel.

MRS. CRAIG, BEING NO LONGER THE WIDOW OF THE DECEASED,
IS NOT ENTITLED TO RECOVER.

The action in this case is purely statutory, having been brought under authority of the Pennsylvania statute of April 26, 1855 (P. L. 109), concerning which the Supreme Court of the State has said in *Marsh vs. Western New York & Pennsylvania Ry. Co.*, 204 Pa., 229—

"Under the Act of April 26, 1855, P. L. 309, the widow of a man killed by the negligence of another is alone entitled to maintain an action to recover damages for his death, although the deceased may have left children surviving him. Such right of action cannot be assigned by the widow to a child before verdict, so as to enable the action to be brought or maintained in the name of the widow for the use of the child."

Under a similar statute, the court held in *Kerns' Appeal*, 120 Pa. 523-531, that—

"What she takes she takes in her character as widow and this being so, she ought to fulfill the condition of the statute when she does make her claim. That is she ought to be at that time the person who is qualified by law to exercise the right, to wit, the widow of the decedent. She is not his widow if she is then the wife of another man, and this was held in *Commonwealth v. Powell*, *Supra*."

As defined by Webster, a widow is—

"A woman who has lost her husband by death and has not taken another."

"Widow: A woman who has lost her husband by death, and also remains unmarried." 4 *Enc. Dict.*, 5183.

In *Com. vs. Powell*, 51 Pa. 438-440, Mr. Justice Thompson said—

"Our law dictionaries agree in their definitions of the usual acceptation of the meaning of the word 'widow:' a woman whose husband is dead. Whart. 'Widow,' an unmarried woman whose husband is dead. Bouvier. Worcester defines

the word thus, 'a woman whose husband is dead and who remains unmarried;' and Webster, in the unabridged edition of 1844, 'a woman who has lost her husband by death, and has not taken another:—one long bereaved of a husband.' The word so entirely and exclusively descriptive of an unmarried condition, having once been married that any other sense would be figurative. In the United States pension laws, when the widow of a soldier is entitled to a pension, she must be unmarried to entitle her to it."

What constitutes a "widow" under the Pennsylvania statute is not exactly a federal question; but it is, perhaps, as much so as the question of contributory negligence, and, in any event, must be answered somewhere if the judgment in this case is disturbed.

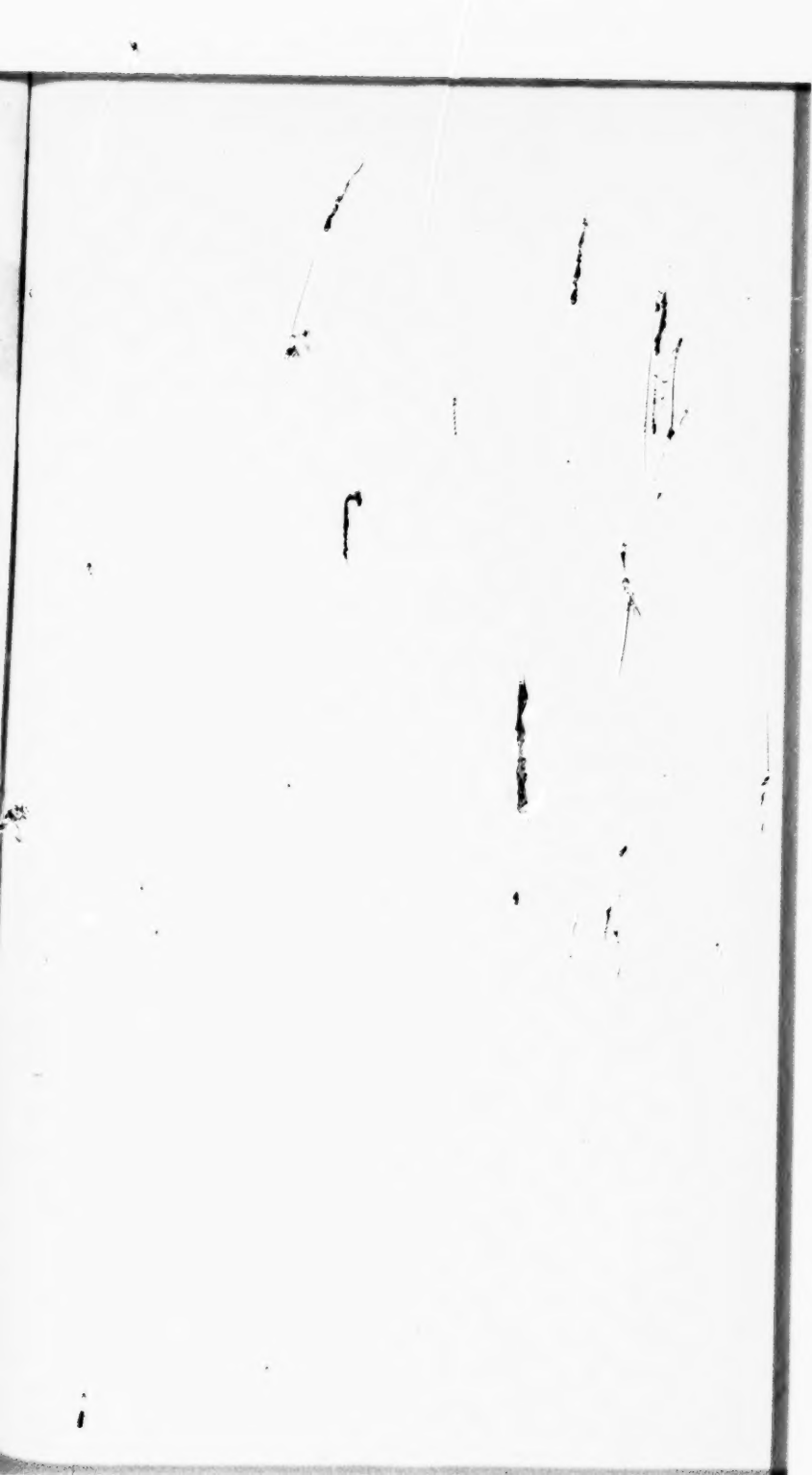
In conclusion, it is respectfully submitted that, upon the whole case, the judgment of the Supreme Court of Pennsylvania is entitled to affirmance; for, even if the steam shovel be found within the contemplation of the Act of Congress of 1893, nevertheless that act, while depriving defendant of the defence of assumption of risk, does not take away the defence of contributory negligence, and, according to the oft-declared doctrine of this and other courts, the plaintiff is not entitled to recovery where, as in this case, the contributory negligence of the deceased was the proximate cause of the action.

M. E. OLMSTED,

A. C. STAMM,

JOHN S. WHITMORE,

Attorneys for Defendant in Error.



SCHLEMMER, NOW CRAIG, *v.* BUFFALO, ROCHESTER AND PITTSBURG RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 374. Argued April 3, 1911.—Decided May 15, 1911.

Where on writ of error the case is reversed on the Federal question and remanded to the highest state court for further proceedings in conformity with the opinion of this court, the state court should, in its remittitur require the further proceedings by the lower court to be in conformity with the opinion of this court, as the matter involved is a Federal right within the protection of this court.

If, however, the trial court on the second trial of a case reversed by this court on the Federal question does give to the statute involved the construction and effect given by this court, the judgment will not be reversed because the remittitur from the highest court to which the mandate of this court was sent, did not specifically direct that further proceedings be had in conformity with the opinion of this court.

The Safety Appliance Acts of March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943, took away from the carrier the defense of assumption of risk by the employé but did not affect the defense of contributory negligence.

There is a practical and clear distinction between assumption of risk and contributory negligence. By the former, the employé assumes the risk of ordinary dangers of occupation and those dangers that are plainly observable; the latter is the omission of the employé to use those precautions for his own safety which ordinary prudence requires.

Under the Safety Appliance Acts, an employé does not by reason of his knowledge of the fact, take upon himself the risk of injury from a car unequipped as required by the acts—but he is not absolved from duty to use ordinary care for his own protection merely because the carrier has failed to comply with the law; and, in the absence of legislation taking it away, the defense of contributory negligence is open.

On the record in this case there appears to have been contributory

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negligence on the part of plaintiff's intestate, apart from the question of assumption of risk, and the state court denied plaintiff no Federal right under the Safety Appliance Acts in dismissing the complaint on the ground of contributory negligence.

222 Pennsylvania, 470, affirmed.

THE facts, which involve the construction of the Safety Appliance Acts and the duties and rights of carriers and of their employés thereunder, are stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. William Hitz*, *Mr. Edward A. Moseley* and *Mr. A. J. Truitt* were on the brief, for plaintiff in error.

Mr. Marlin E. Olmsted, with whom *Mr. A. C. Stamm* and *Mr. John G. Whitmore* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This action was brought in a Pennsylvania court to recover for wrongfully causing the death of Adam M. Schlemmer, plaintiff's intestate, as a result of injuries received while in the employ of the railroad company. The case has been once before in this court, and is reported in 205 U. S. 1, 13. The injury was received while Schlemmer, an employé of the defendant railroad company, was endeavoring to couple a shovel car to the caboose of one of the railroad trains of the defendant company.

Before the case first came here the Supreme Court of Pennsylvania had held that the plaintiff could not recover damages because of the contributory negligence of the deceased. 207 Pa. 198. This court reversed the Supreme Court of Pennsylvania, and remanded the case for further proceedings in conformity with the opinion of this court.

For a proper understanding of the case a brief state-

ment of the facts will be necessary. The shovel car was not equipped with an automatic coupler as required by the act of March 2, 1893, c. 196, § 2, 27 Stat. 531, and that fact was the basis of the action for damages. The shovel car had an iron drawbar, weighing somewhere about eighty pounds, protruding beyond the end of the shovel car. The end of this drawbar had a small opening, or eye, into which an iron pin was to be fitted when the coupling was made; this was to be effected by placing the end of the drawbar into the slot of the automatic coupler with which the caboose was equipped. Owing to the difference in the height, the end of the shovel car would pass over the automatic coupler on the caboose in case of an unsuccessful attempt to make the coupling, and the end of the shovel car would come in contact with the end of the caboose.

Plaintiff's intestate was an experienced brakeman, having been in the service fifteen or sixteen years. At the time when he undertook to couple the train with the shovel car to the end of the caboose, he went under the end of the shovel car and attempted to raise the iron drawbar so as to cause it to fit into the slot of the automatic coupler on the caboose. While so doing his head was caught between the ends of the shovel car and the caboose, and he was almost instantly killed. This happened between eight and nine o'clock on an evening in the month of August, and while dusk had gathered it was not very dark, and the testimony tends to show that the situation was plainly observable.

When this case was first before the Supreme Court of Pennsylvania, that court expressed doubt as to whether the act of Congress applied in actions of negligence in the courts of Pennsylvania, and the judgment on the nonsuit in the court below was sustained because of the contributory negligence of the deceased.

This court held that the shovel car was in course of

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transportation between points of different States, and therefore was being used in interstate commerce; that the shovel car was a car within contemplation of § 2 of the act of Congress; that § 8 of that act had deprived the company of the defense of assumed risk on the part of an employé; that the ruling in the Pennsylvania court upon contributory negligence was so dépendent upon an erroneous construction of the statute that it could not stand. 205 U. S. 1, 13. As the alleged right to recover was under a Federal statute, alleged to have been improperly construed against the plaintiff in error, the case presented a claim of Federal right, a denial of which was reviewable here, and the case, for the reason stated, was reversed by this court and sent back for further proceedings in conformity with the opinion of this court.

We find no occasion to depart from the former decision, and will proceed to examine the record as now presented, which, in material respects, differs from the one previously before the court. It is first objected by the plaintiff in error that the Supreme Court of Pennsylvania remanded the case to the lower court for trial contrary to the mandate sent down upon the reversal by this court. The Supreme Court of Pennsylvania remitted the case, after receipt of the mandate from this court, to the lower court to be retried "on the settled principles of contributory negligence, as heretofore declared in the decisions of this court"—Supreme Court of Pennsylvania. The counsel for plaintiff in error moved the Supreme Court of Pennsylvania to amend its judgment and remittitur so as to conform with the mandate of this court, which motion was overruled.

We are of opinion that the order and remittitur of the Supreme Court of Pennsylvania, in compliance with the mandate of this court, should have required the further proceedings to conform to the opinion of this court, as its mandate required, and as was within the authority of this

court, the matter involved being a right of Federal creation within the ultimate protection of this court.

If an examination of the record indicated that by reason of this mandate the subsequent proceedings in the state court had operated to deprive the plaintiff in error of the benefit of a trial under the Federal statute properly construed, we should be constrained to reverse the case. But an examination of the record discloses that the trial judge regarded the decision of this court as settling the right of the plaintiff in error to rely upon the Federal statute in question, and as conclusive of the fact that the shovel car was being employed in interstate commerce at the time of the injury, and was a car within the meaning of the act, and that assumption of risk was no defense to the action. So, it does not appear that the form of mandate sent down by the Supreme Court of Pennsylvania, after the case was reversed here, worked to the prejudice of the plaintiff in error.

The trial court submitted the case to the jury upon the issues joined under the Federal statute, including the question whether the plaintiff's intestate at the time of the injury had been guilty of contributory negligence. Under these instructions the jury found a verdict for the plaintiff.

The court then granted a rule to show cause why judgment should not be rendered *non obstante veredicto*, which motion was granted, and an opinion delivered, in which the judge held that the testimony did not warrant the conclusion that in making the coupling the risk was so obvious that an ordinarily careful and prudent brakeman would not have undertaken it; and therefore under the statute, assumption of risk was no defense, but reached the conclusion that the deceased was guilty of contributory negligence in failing to exercise care according to the circumstances in making the coupling in the way he attempted to make it, and in not adopting a safer way, which was pointed out to him at the time.

Upon the second appeal the Supreme Court of Pennsylvania affirmed the judgment of the trial court, saying:

"*Per Curiam*: It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence, either greater or less than his own, of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head, though twice expressly cautioned at the time as to the danger of so doing." 222 Pennsylvania, 470.

The case is now here upon a petition in error to reverse this judgment of affirmance. The statute at the time of the injury complained of took away assumption of risk on the part of the employé as a defense to an action for injuries received in the course of the employment. The defense of contributory negligence was not dealt with by the statute.¹

When the case was here before we did not find it necessary to pass upon the question whether contributory negligence on the part of an injured employé would be a defense to an action under the law as it then stood, for upon the record as then presented the court was of opinion that to sustain the defense of contributory negligence would amount to a denial to the plaintiff of all benefit of the statute which made the assumption of risk no longer a defense.

While, as was said in the case when here before, assump-

¹ By the third section of the act of April 22, 1908, 35 Stat. 65, c. 149, amending the Employers' Liability Act, no employé injured or killed is to be held guilty of contributory negligence in any case where the violation by a common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

tion of risk sometimes shades into negligence as commonly understood, there is, nevertheless a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employé is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employé may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. *Choctaw, Oklahoma &c. R. R. Co. v. McDade*, 191 U. S. 64, 67, 68, and former cases in this court therein cited.

Contributory negligence, on the other hand, is the omission of the employé to use those precautions for his own safety which ordinary prudence requires. (See in this connection *Narramore v. Cleveland &c. R. R. Co.*, 37 C. C. A. 499, 506.)

In the present case, the statute of Congress expressly provides that the employé shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel-car was not equipped with an automatic coupler he would not from that knowledge alone, take upon himself the risk of injury without liability from his employer.

But there is nothing in the statute absolving the employé from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employé was not for that reason absolved from the duty of using ordinary care for his own protection under the circum-

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stances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employes. *Krause v. Morgan*, 53 Oh. St. 26; *Holum v. Railway Co.*, 80 Wisconsin, 299; *Grand v. Railway Co.*, 83 Michigan, 564; *Taylor v. Manufacturing Co.*, 143 Massachusetts, 470. And such was the holding of the Court of Appeals of the Eighth Circuit, where the statute now under consideration was before the court. *Denver & Rio Grande R. R. Co. v. Arrighi*, 129 Fed. Rep. 347.

In the absence of legislation, at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist, and the Federal question presented upon this record is: Was the ruling of the state court in denying the right of recovery upon the ground of contributory negligence, in view of the circumstances shown, such as to deprive the plaintiff in error of the benefit of the statute which made assumption of risk a defense no longer available to the employer? To answer this question we shall have to look to the testimony adduced at the trial, all of which is contained in the record before us. As we have already said, the testimony shows that the plaintiff's intestate was an experienced brakeman. A witness who is uncontradicted in the record testified that just before Schlemmer got out of the caboose, when he saw the train backing up, he was told: "We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." (At Bradford the method of making the coupling was by means of pushing the caboose up against the train instead of backing the train against the caboose.) To this Schlemmer replied, with emphasis, "Back up." He then proceeded to make the coupling, with the result stated.

Another witness, the yard conductor, testified without contradiction, that just before the cars got together he walked up to Schlemmer, and told him they had better shove the caboose on by hand, to which he answered:

"Never mind, I will make this coupling." To which the witness answered: "Well, you will have to get down." Witness testified that he called to him twice to get down, the last time not more than a second possibly a couple of seconds, before he was injured. This witness furthermore testified that he had a sufficient crew to push the caboose up by hand, that there was plenty of force to shove the caboose up in that way; that that was a great deal safer way to make the coupling than backing on to the caboose. The testimony further shows that there was plenty of room under the projection of the shovel car to operate the drawbar and raise it up. In fact, in this manner, the coupling was made a few minutes after the unfortunate occurrence which resulted in the death of the deceased.

As the record is now presented there is no proof in the case that the deceased was ordered to make the coupling in the manner he did, and there is testimony to the effect that just before the injury the conductor in charge of the train said to the deceased: "Mr. Schlemmer, you be very careful now, and keep your head down low, so as not to get mashed in between those cars." He said he would.

In view of this record we cannot say that the court, in denying a recovery to the plaintiff upon the ground of contributory negligence of the deceased denied to her any rights secured by the Federal statute. Entirely apart from the question of assumption of risk, which, under the law, could not be a defense to the plaintiff's action, as the law then stood there remained the defense of contributory negligence.

After an examination of the record as now presented, containing testimony not adduced at the former trial, we are constrained to the conclusion that there was ample ground for saying, as both the trial court and the Supreme Court of the State of Pennsylvania did, that the decedent met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at

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the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did.

As we have said, the Federal question in the record, and the only one which gives us jurisdiction, is: Did the trial and judgment deprive the plaintiff in error of rights secured by the Federal statute? The views which we have expressed require that the question be answered in the negative.

The judgment of the Supreme Court of Pennsylvania is
Affirmed.